Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMY DOUGLAS HILL,
LUCAS GALLAGHER, AND GEORGE LARRY COURS,
AS NEXT FRIEND OF COURTNEY COURS, A MINOR,
Petitioners,

v.

CITY OF FREEPORT, TEXAS AND BRAZOSPORT INDEPENDENT
SCHOOL DISTRICT,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "special needs exception" to the probable cause and warrant requirements of the Fourth Amendment authorized Respondents, a municipality acting through its police force and a public school district, to arrest Petitioner public school children, subject them to physical searches, handcuff and remove them from campus and hold them in custody solely because they were believed to associate with a student who was suspected of writing a threatening note?

PARTIES TO THE PROCEEDING

~ PETITIONERS

Petitioners are Jeremy Douglas Hill, Lucas Gallagher, and George Larry Cours, as next friend of Courtney Cours. All of the petitioners are individual citizens of the United States, residing in the Southern District of Texas. Petitioners have no corporate affiliations. Petitioners were the plaintiffs in the District Court, and Appellants in the Fifth Circuit Court of Appeals.

RESPONDENTS

The City of Freeport is an incorporated city organized under the laws of the State of Texas and located in Brazoria County, Texas. Brazosport Independent School District is a school district organized under the laws in the State of Texas and operating in and around Freeport, Brazoria County, Texas. Respondents were the defendants in the District Court, and the Appellees before the Fifth Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a Writ of Certiorari to review the decision and judgment of the Fifth Circuit Court of Appeals, which held that the "special needs exception" to the warrant and probable cause requirements of the Fourth Amendment authorized the actions of Respondents in responding to the discovery of a threatening note on campus by physically searching, handcuffing and arresting all those students believed to associate with the suspected perpetrator, holding them in custody for several hours and subjecting them to threats and intimidation.

OPINIONS BELOW

The unreported opinion of the Fifth Circuit Court of Appeals is appended hereto as Appendix B. The opinion of the United States District Court for the Southern District of Texas (App. D) is reported at *Stockton, et al. v. City of Freeport, et al.*, 147 F.Supp.2d 642 (S.Dist. Tex. 2001).

STATEMENT OF JURISDICTION

The District Court entered an Order Granting Motion to Dismiss, disposing of all claims and all parties, on May 14, 2001. Record Excerpts ("R.E."), Docket Entry No. 27. The court's Final Judgment was also entered on that date. R.E., Docket No. 28. Notice of Appeal was timely filed on May 30, 2001. R.E., Docket No. 29.

The Decision and Judgment of the Fifth Circuit Court of Appeals were entered on May 20, 2002. See Apps. B and C. A timely Petition for Panel Rehearing was filed on June 3, 2002. The Court of Appeals entered an order denying the petition on June 17, 2002. (App. A). The jurisdiction of this court is properly invoked

pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONST., AMEND. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

FED. R. CIV. PROC. RULE 12(b)(6):

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by

motion: ....(6) failure to state a claim upon which relief may be granted.

STATEMENT OF THE CASE

Petitioners Jeremy Hill, Lucas Gallagher, and Courtney Cours brought this action, through their parents and guardians, against the City of Freeport, Texas and the Brazosport Independent School District ("BIDS") after they were pulled from their high school classrooms by Freeport police, physically searched and handcuffed, placed in police vehicles and repeatedly threatened with extensive prison sentences if they attempted to resist the arrests. *See* First Amended Original Complaint, App. at E5 - E6, ¶ 12. Petitioners were taken to the police station in Freeport, Texas, where they were held for several hours and then, after a verbally abusive lecture from the police officials and school principal, were released to their parents custody. *Id.* at E6 - E8, ¶¶ 13 - 15. Petitioners were never charged with any crime. *Id.* at E13, ¶ 23. The Freeport police had no warrant to arrest Petitioners or authorizing the bodily searches of each Petitioner. *Id.* at E5, ¶ 16. In their First Amended Complaint,[1] Petitioners pleaded with particularity

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[1] Petitioners filed a First Amended Complaint (App. E) after Defendants filed their initial Motions to Dismiss Petitioners' original complaint. The First Amended Complaint dropped certain state law claims and First Amendment claims that had been raised by Petitioners in their original complaint. Courtney Cours was also added as a plaintiff under the amended complaint. After the Amended Complaint was filed, Defendants filed Amended Motions to Dismiss, and it was those Motions to Dismiss that the trial court ruled on. In their response to the amended Motions to Dismiss, Petitioners specifically requested that the trial court grant leave to amend their complaint on the Fourth and Fourteenth Amendment

that neither the Freeport police nor BISD officials possessed reasonable suspicion that they had engaged in unlawful conduct or had breached school rules, but rather, that they had been subjected to an unlawful search and seizure intended by the government actors to intimidate the students who were seized as well as the entire student population. *Id.*; *see also* App. at E9 - E10, ¶¶ 17 - 18; E13, ¶ 23, E14, ¶ 25. Petitioners specifically pleaded that the actions against them were taken with deliberate indifference to their rights, health and welfare, and that the unlawful conduct was the result of official policies and procedures of BISD and due to poor training and supervision by BISD and the City of Freeport over their police officers and school officials. App. at E15, ¶ 26.

The District Court dismissed the case on the Amended Motions to Dismiss filed by each of the respondents under Rule 12(b)(6). *See* App. D. The court based its dismissal on this Court's holding in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) and the Fifth Circuit Court of Appeals opinion in *Milligan v. City of Slidell*, 226 F. 3d 652, 653 (5th Cir. 2000) (citing *Vernonia, supra),* applying a "special needs" analysis to school invasions of privacy rights of students and police detentions of students without probable cause. App. at D6 - D8. Adopting the arguments made by the Respondents in their Amended Motions to Dismiss, the District Court found that the widespread concern about student rampage shootings justified a finding of special needs to support the warrantless search and seizure of the Petitioner high school students. App. at D9. Further, the court found that the actions of the Respondents were effective in preventing school violence at Brazosport High School, *id.*, adopting the express argument of the

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claims if the trial court found that the amended complaint failed to adequately state a claim. Leave to amend was denied.

City of Freeport. *Id.* Incredibly, the District Court stated that Respondents should be praised for their treatment of Petitioners:

> After examining the Plaintiffs' allegations, the Court is firmly convinced that no Constitutional claim has been stated. Taken as true the allegations demonstrate, at best, insensitive, heavy-handed actions, and at worst, bumbling hysteria on the part of both the School and the police officers. In other words, what occurred at the School was, at most, an extraordinary overreaction. However, in the aftermath of the Columbine High violence, some period of hypersensitivity among schools officials was called for, and indeed should be lauded. In the face of a genuine nationwide tragedy, which has been mimicked at other schools, and with which we all therefore continue to struggle, it simply is not improper to overreact.

App. at D10.

Petitioners appealed the decision to the Fifth Circuit Court of Appeals. As they had in the District Court, Petitioners argued that the pleadings were sufficient to state a claim under 42 U.S.C. § 1983, and further argued that the trial court erred in making factual conclusions based on the pleadings of the Respondents in violation of Rule 12(b)(6), FED. R. CIV. P. Petitioners also argued that special needs analysis was not the appropriate standard to apply to warrantless searches and seizures of students on school grounds when the action taken against the students was a criminal matter primarily conducted by the local police rather than school officials. Petitioners argued that probable cause was required before local police officers could take action against them, as federal courts have established under a line of cases beginning with *Picha v.*

Wielgos, 410 F. Supp. 1214 (N.D. Ill. 1976), and referenced in this Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325, 332, n. 2 (1985). The trial judge specifically rejected the argument that a probable cause standard applied when the police took that action against Petitioners, and the Fifth Circuit failed to address the issue, simply adopting the special needs standard. App. at B4.

The Fifth Circuit panel assigned to the case heard oral argument in the case on March 5, 2002 and issued its opinion on May 20, 2002. The appellate court opinion was authored by Judge Politz, who was joined by Judge Clement. App. B at B2. Judge Stewart concurred in the judgment only. *Id.* The Fifth Circuit stated that "under all of the relevant circumstances," it agreed with the District Court that "the mere detention of the students for several hours was not sufficient to establish a Fourth Amendment violation in light of the school's custodial and tutelary responsibilities." App. at B5. Without acknowledging what the special circumstances were or that the Petitioners specifically set forth factual allegations in their complaint that the stated purpose of the school and police action against them was not for any legitimate law enforcement purpose, but instead to intimidate and scare the Petitioners and their fellow students, the Fifth Circuit panel trivialized the police action to support its decision to uphold the District Court's dismissal of the case.[2] In reaching its conclusions, the Fifth Circuit incorrectly

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[2] In addition to their errors of substantive constitutional law, both the District Court and the Fifth Circuit grossly misapplied well-established procedural law (FED. R. CIV. P. 12(b)(6)) by disregarding specific factual allegations made by the Plaintiffs about the conduct and motivation of Respondent police and school officials. In a suit against a municipality under 42 U.S.C. § 1983, there is no heightened pleading requirement placed upon plaintiffs. *Leatherman v. Tarrant County*, 507 U.S. 163 (1993). The standard for pleading requires

stated that "neither the officers nor the school authorities have placed in the record any reason for the detention." App. at B3. In fact, the Respondents made extensive arguments to support their conduct and these arguments were adopted by the trial court.

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only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. Rule 8(a)(2). It is not until later in the case, such as in consideration of a motion for summary judgment, that the parties are required to match facts against legal elements. *Palmer v. Board of Education Community United Sch. Dist.* 46 F. 3d 682, 688 (7th Cir. 1995). Nor is it necessary to specify particular legal theories in the complaint, as long as the facts alleged give adequate notice to the defendant of the basis of the suit. *Wudtke v. Davel*, 128 F. 3d 1057, 1061 (7th Cir. 1997). Petitioners' complaint stated in clear and plain language that they had no part of any allegedly threatening note left in a classroom a week before the illegal seizure. Petitioners pleaded particular facts regarding the improper motivation for the search and seizure (intimidation of the student body) based on statements against interest made by both school officials and police officials. Petitioners also pleaded that the police informed them they were never suspected of any wrongdoing but had been searched, seized and held against their will to set an example throughout the school and town that the police were in charge and could take whatever action they desired against students. Petitioners pleaded that these actions were approved by the school board and were based on new policies that the school district was implementing in light of the Columbine High School shooting the week before. Petitioners also pleaded that the police action was a result of a failure to train and supervise its officers on the fundamentals of Fourth Amendment probable cause. Insofar as these quasi-factual determinations were not crucial to the courts' legal conclusion that the special needs doctrine justified the searches, and there is no impediment to a reassessment of these allegations based on the proper standard on remand.

Petitioners, therefore timely petitioned for a panel rehearing, which was denied on June 17, 2002. *See* App. A.

REASONS FOR GRANTING THE WRIT

I.

THE POSITION OF THE FIFTH CIRCUIT COURT OF APPEALS IS A GROSS MISAPPLICATION OF THE SUPREME COURT'S HOLDING IN *VERNONIA V. ACTON*, AND SHOULD BE SUMMARILY REVERSED FOR REVIEW IN LIGHT OF THE COURT'S RECENT DECISION IN *POTTAWATOMIE COUNTY V. EARLS*.

The federal courts have recognized that when local law enforcement is involved in investigations of school children for criminal activity, absent exigent circumstances, the same probable cause requirements control police action regardless of whether or not the child is in school or off of school grounds. In the instant case, both the District Court and the Fifth Circuit Court of Appeals disregarded extensive precedent and held that under a special circumstances exception to the probable cause requirement as stated by this Court in *Vernonia*, the police can enter a school yard, seize students, search their persons for weapons, handcuff them, transport the students to the police station in police vehicles and hold them against their will and under threat of extensive incarceration, without probable cause or any individualized suspicion that the students have done anything illegal or in violation of school rules. (App. at B5 (Circuit opinion) and D7 - D8 (District Court opinion)).

In this Court's opinion in *New Jersey v. T.L.O.*, the Court

authorized the seach of a student by a school official when the school official had reasonable suspicion that a particular student had violated either the law or a school rule. 469 U.S. at 345. The Court specifically noted, however, that it did not extend its ruling authorizing such searches to local police officers, citing the District Court's decision in *Picha v. Wielgos. T.L.O.*, 469 U.S. at 341, n. 7. The position articulated in *Picha* has been widely regarded as the rule of law on the issue of whether or not local police officers must have probable cause based on individualized suspicion and a warrant to search and/or seize students while they are on school grounds. *New Jersey v. T.L.O., id.*; *Piazzola v. Watkins*, 442 F. 2d 284 (5th Cir. 1971); *Horton v. Goose Creek Ind. School Dist.*, 690 F. 2d 470 (5th Cir. 1982); *Doe v. Taylor Ind. School Dist.*, 975 F. 2d 137 (5th Cir. 1992); *Fee v. Hernedon,* 900 F. 2d 804 (5th Cir. 1990); *Jefferson v. Yselta Ind. School Dist.*, 817 F. 2d 303 (5th Cir. 1987); *Bilbrey v. Brown,* 738 F. 2d 1462 (9th Cir. 1982) (citing *Piazzola, supra*); *Jones v. Latexo Ind. School Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980); *Belliener v. Lund,* 438 F. Supp. 47 (N.D.N.Y. 1977); *Cales v. Howell Pub. Schools,* 635 F. Supp. 454 (E.D. Mich. 1985); *M. by R. and S. v. Board of Educ. Ball-Chatham Comm. Unit School Dist. No. 5*, 429 F. Supp. 288, 292 (S.D. Ill. 1977); *New Mexico v. Tywane H.*, 933 P. 2d 251 (Ct. App. New Mexico 1997); *Kuehn v. Renton School Dist. No. 403,* 694 P. 2d 1078 (Wash. 1985); *Rone v. Davies County Board of Educ.*, 655 S.W. 28 (Ct. App. Kentucky 1983); *M.J., v. Florida*, 399 So. 2d 996 (Ct. App. Fla., 1st Dist. 1981); *In the interest of P.E.A.*, 754 P.2d 382 (Colo. 1988). In the instant case, both the Fifth Circuit and the District Court simply ignored this extensive body of federal and state case law requiring police to have probable cause before searching and/or seizing students.

The District Court's opinion, published at *Stockton, et al. v. City of Freeport, et al*, 147 F. Supp. 2d 642 (S.D. Tex. 2001), rejects this extensive body of case law requiring individualized suspicion or probable cause. In fact, the District Court and the Fifth Circuit cited *no case* that supports their conclusion that police have the constitutional authority to enter school grounds, seize students who are sitting quietly in their classrooms, search their person, place the students in handcuffs, remove them from the school grounds in police cars and hold them at the police station for hours without probable cause or individualized suspicion. Instead, the trial court and the Fifth Circuit relied upon *Vernonia*, in spite of that case's express holding that permitted school officials, after a showing of a special need due to a pattern of drug abuse among student athletes, to randomly drug test students under a very stringent set of guidelines to insure that the students' right to privacy is protected and that in the event that a drug test reveals drug use, there is *no involvement by law enforcement*. *Cf. Vernonia*, 515 U.S. at 671 ("The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context."). The lower courts' decisions cannot reasonably be squared with the Supreme Court's directives for special needs searches articulated in *T.L.O.* and *Vernonia*.

After the Fifth Circuit issued its opinion in this case, the Supreme Court issued its opinion in *Board of Educ. of Ind. School Dist. No. 92 of Pottawatomie County, v. Earls*, __ U.S. __, 122 S.Ct. 2559 (2002), extending the right of school officials, *without the assistance or participation of local law enforcement officers*, to drug test students who have chosen to voluntarily participate in extracurricular activities, when a condition of participation is giving prior consent to being subjected to random drug testing. In Justice Ginsberg's dissent in *Earls*, she noted:

> In short, *Vernonia* applied, it did not repudiate, the principle that "legality of a search of a student should depend on the reasonableness, *under all the circumstances*, of the search." *T.L.O.*, 469 U.S. at 341 (emphasis added). Enrollment in a public school, and election to participate in school activities beyond the bare minimum that the curriculum requires, are indeed factors relevant to reasonableness, but they do not on their own justify intrusive, suspicionless searches. *Vernonia*, accordingly, did not rest upon these factors; instead, the Court performed what today's majority aptly describes as a "fact-specific balancing." Balancing of that order, applied to the facts now before the Court, should yield a result other than the one the Court announces today.

122 S. Ct. at 2573 - 74 (Ginsburg, J., dissenting) (citations omitted).

As Justice Ginsburg observed in her dissent in *Earls*, both in *Vernonia* and *Earls*, this Court has required that the special needs exception to the probable cause requirement must be based upon a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate government interests. *Id.* In the instant case, assuming that the special needs analysis the Court has applied to searches by school officials also applies to student searches and seizures by local law enforcement, the trial court's order dismissing this case was completely inappropriate and is not supported by *Vernonia* or *Earls*.

Petitioners urge that this case is appropriate for review by a grant of certiorari, vacation and remand ("GVR") in light of the Court's decision last term in *Board of Educ. v. Earls*, insofar as

the lower court rulings cannot withstand scrutiny under the standard for special needs searches applied in that decision. Neither the District Court nor the Circuit Court had the benefit of the Court's guidance in *Earls*, insofar as the Court issued that decision on June 27, 2002, after the Fifth Circuit denied rehearing in the case and well after the panel decision was issued on May 20, 2002.

This Court's power to GVR in light of an intervening decision of this Court is well-established:

> [T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent judges. We have GVR'd in light of a wide range of developments, including our own decisions.....

Lawrence v. Chater, 516 U.S. 163, 166-67 (1996). As the Court has explained:

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the lower court's insight before we rule on the merits, and alleviates the potential for unequal treatment that is inherent in our inability to grant plenary review of all pending cases raising similar issues....

Id. at 167. For this reason, where "intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the

decision below rests on a premise that the lower court would reject if given the opportunity for further consideration... a GVR order is, we believe, potentially appropriate." *Id.*

The GVR standards are certainly applicable to a case such as this, which arises in a developing area of the law that deserves closer scrutiny. *See Indianapolis v. Edmond*, 531 U.S. 32 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). In *Earls*, as in the Court's other recent cases applying the special needs exception, the majority opinion authored by Justice Thomas stressed at several points the almost utter lack of involvement by criminal authorities that militated in favor of the blanket drug testing policy at issue in that case. 122 S.Ct. at 2564 ("the School District's policy is not in any way related to the conduct of criminal investigations"); *id.* at 2566 ("Moreover, the test results are not turned over to any law enforcement authority"); *id.* at 2567 ("Given... the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant."); *id.* at 2571 (Breyer, J., concurring) ("the testing program is neither criminal nor disciplinary in nature"). *See also Edmond*, 531 U.S. at454 ("Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment."); *Ferguson*, 532 U.S. at 84 ("Given the primary purpose of the Charleston program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs.", Moreover, the Court squarely criticized the very action taken by Respondents in this case, rounding up the "usual suspects," students targeted because they listened to the wrong music or dressed the wrong way. 122 S.Ct.

at 2568 - 69 (declining to craft search standard that "might unfairly target members of unpopular groups"); *id.* at 2571 (Breyer, J., concurring) (cautioning against "unfairly target[ing] members of unpopular groups... or leav[ing] those whose behavior is slightly abnormal stigmatized in the minds of others").

In view of the Court of Appeals' remarkable departure from the cabining strictures on the special needs exception articulated by the Court in *Vernonia* and reemphasized in *Earls*, Petitioners submit that the this case is appropriate for further review by the lower courts in light of the Supreme Court's intervening decision in *Earls*, and respectfully request that the Court grant the Petition, vacate the decision of the Fifth Circuit Court of Appeals and remand with instructions to review the case in light of Earls.

II.

PETITIONERS' APPEAL PRESENTS THE IMPORTANT CONSTITUTIONAL ISSUE WHETHER THE "SPECIAL NEEDS EXCEPTION" IS BROAD ENOUGH TO PERMIT WARRANTLESS SEARCHES AND ARRESTS OF PUBLIC SCHOOL STUDENTS WITHOUT REASONABLE SUSPICION THEY ARE ENGAGED IN CRIMINAL ACTIVITY.

When the events that gave rise to this case occurred, the country was seemingly under the threat of rampage shootings at both the workplace and at schools. These shootings were widely reported by the media and the subject of great debate. Unfortunately, the District Court and the Fifth Circuit have allowed the same hysteria that the trial court acknowledged infected the Freeport police and Brazosport school officials, App. at D10, to discard reason and permit singling out students for physical

searches, handcuffing and arrest without probable cause or suspicion, or, as the City of Freeport admitted in its appellate briefing,[3] without any individualized suspicion that they had engaged in criminal conduct or were even witnesses to criminal conduct.

Although it is a district court case, *Picha v. Weilgos* has been widely cited and relied upon by both state and federal courts as the standard that local law enforcement must abide by when taking actions against students on school property or at school functions.[4] In the instant case, the District Court published its opinion, giving making it as much significant precedential value as the *Picha* case certainly has had for almost thirty years. *See* cases cited, n. 4, *supra*. Should this Court allow the decisions of the courts below to stand without review, there is no reason to doubt that the case will become as widely relied upon for the proposition that law

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[3] *See* Brief of Appellee City of Freeport, at 11.

[4] *See Cole v. Snow*, 586 F.Supp. 655, 665 (D.Mass. 1984); *Morale v. Grigel*, 422 F.Supp. 988, 997 (D.N.H. 1976); *Bellnier v. Lund, supra*, 438 F.Supp. at 52; *Horton v. Goose Creek Indep. School Dist., supra*, 690 F.2d at 481; *Jones v. Latexo Indep. School Dist., supra*, 499 F.Supp. at 229; *Cales v. Howell Public Schools, supra*, 635 F.Supp. at 458; *Landstrom v. Illinois Dep't of Children & Family Services*, 892 F.2d 670, 676 (7th Cir. 1990); *United States v. Muehlbauer*, 892 F.2d. 667 (7th Cir. 1990); *Doe v. Chicago*, 580 F.Supp. 146, 150 (N.D. Ill. 1983); *Doe v. Renfrow*, 475 F.Supp. 1012, 1023-24 (N.D.Ind. 1979); *M. v. Board of Educ., supra*, 429 F.Supp. at 292; *Bilbrey v. Brown, supra*, 738 F.2d at 1466; *Franz v. Lytle*, 997 F.2d 784, 790 (10th Cir. 1993); *James v. Unified School Dist. No. 512*, 959 F.Supp. 1407, 1414 (D.Kan. 1997); *Tatum v. Morgan*, 562 F.2d 1279, 1285 (D.C. Cir. 1977). In addition to these reported federal decisions, there are also over a dozen state appellate decisions citing *Picha*.

enforcement officials can enter school grounds and search and seize students without probable cause, because the police are either bumbling hysterics or simply grossly insensitive, as long as the students selected for such abusive behavior had some social connection to a student who may or may not have broken a school rule.

While the Supreme Court did not have occasion to directly address the issue of the standards that local law enforcement must follow before invading the privacy rights of students in *New Jersey v. T.L.O., Vernonia,* and most recently, *School Bd. of Pottawatomie Cty. v. Earls,* the Court has consistently recognized that there are limits to the invasion of a student's privacy rights that the Court will tolerate when it comes to searches, and that a special needs assessment is a fact based determination that requires affirmative proof that the school district have some reasonable belief that the means chosen to deal with a defined problem will be effective in resolving the problem. The Supreme Court has never allowed the kind of wanton conduct that took place at Brazosport High School, and no other court within the authority of this Court save the U.S. District Court in Galveston, Texas and the Fifth Circuit Court of Appeals, has sanctioned such conduct as legal. As school and police officials become more concerned with finding immediate answers to very complex situations, the District Court's published opinion in this case, and its summary affirmance by the Court of Appeals, gives law enforcement carte blanche to do as they please when it comes to searching and seizing students, even if those actions are grossly insensitive to the welfare and legal rights of students and are the result of "bumbling hysteria" rather than a well considered solution to a serious problem.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted, and the case vacated and remanded for reconsideration in light of *Board of Educ. v. Earls*, *supra*, or in the alternative, set for hearing on the merits before this Honorable Court.

Respectfully submitted,

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September 13, 2002

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A1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40588

LISA STOCKTON, Etc; ET AL

Plaintiffs

JEREMY DOUGLAS HILL; LUCAS GALLAGHER;
GEORGE LARRY COURS, as next friend of Courtney Cours,
a minor

Plaintiffs - Appellants

v.

CITY OF FREEPORT, TEXAS; BRAZOSPORT
INDEPENDENT SCHOOL DISTRICT

Defendants - Appellees

Appeal from the United States District Court for the
Southern District of Texas, Galveston

ON PETITION FOR REHEARING

Before POLITZ, STEWART, and CLEMENT, Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ J. Stewart
United States Circuit Judge

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* Due to his death on May 25, 2002, Judge Politz did not participate in this decision.

B1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40588

LISA STOCKTON, ETC., ET AL,

Plaintiffs,

JEREMY DOUGLASS HILL;
LUCAS GALLAGHER; GEORGE
LARRY COURS, as next of friend of
COURTNEY COURS, a minor,

Plaintiffs-Appellants,

versus

CITY OF FREEPORT, TEXAS;
BRAZOSPORT INDEPENDENT
SCHOOL DISTRICT,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
USDC No. G-00-CV-744

Before POLITZ, STEWART, and CLEMENT, Circuit Judges.

POLITZ, Circuit Judge:*

Jeremy Douglass Hill, Lucas Gallagher, and Courtney Cours appeal the Fed. R. Civ. P. 12(b)(6) dismissal of their civil rights actions under 42 U.S.C. § 1983, and the Fourth and Fourteenth Amendments, against the Brazosport Independent School District and the City of Freeport, Texas. They also assert that the district court erred in denying them leave to amend their complaint a second time. Concluding that the complaint and amendment fail to state a constitutional violation, and that the district court did not abuse its discretion in denying leave to amend, we affirm.

BACKGROUND

The instant action involves a Rule 12(b)(6) dismissal and we accordingly treat all of the allegations in the complaint as true.[1] Three days after the tragic and shocking 1999 shooting incident at Columbine High School, a threatening letter was found in the Brazosport High School computer room. School authorities suspected that a particular student, who spent his idle time with appellants, had left the letter there. Appellants were sophomores attending Brazosport High School in Freeport. They ate lunch together and traveled in the same social circle. On April 27, 1999, they were confronted by officers of the Freeport Police Department who placed them in a police car and took them to the Freeport

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* Pursuant to 5th CIR.R.47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR.R.47.5.4.

[1] Malina v. Gonzales, 994 F.2d 1121, 1125 (5th Cir. 1993).

municipal building. This building houses the local municipal court. During the process, the officers used profane language and threatened the students with immediate imprisonment and other harm if they did not yield to the officers' authority. The confrontation and subsequent detention took place without a warrant. Neither the officers nor the school authorities have placed in the record any reason for the detention.

Upon their arrival at the courthouse the students were placed in the municipal courtroom under a threat of five years imprisonment if they left. After an hour or so in the courtroom they were told to wait with their children in the courtroom. The police and the school principal then lectured the students and parents, after which they were permitted to leave. Hill was the only appellant ever questioned by the police. His interrogation was short and occurred only after his mother stated that she could not wait in the courtroom and had to leave with her son. He was questioned briefly and they left the building.

ANALYSIS

In granting the Fed. R. Civ. P. 12(b)(6) dismissal, the district court concluded that the plaintiffs failed to allege a Fourteenth Amendment violation, a Fourth Amendment violation, or a custom or policy as a cause of the violations. Appellants insist that the district court erroneously dismissed their complaint. We review a dismissal under Rule 12(b)(6) *de novo*,[2] and dismissal is only proper when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

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[2] Spiller v. City of Texas City, Police Dep't., 130 F.3d 162, 164 (5th Cir. 1997).

relief."[3] Appellants complain that the district court failed to accept as true all facts alleged in their complaint and failed to draw reasonable inferences from those facts. Additionally, they assert that the court applied the incorrect standard to the police/school actions by adopting a "special needs" analysis rather than a probable cause or reasonable suspicion analysis. After reviewing the record we are not persuaded.

Fourth Amendment

"The Fourth Amendment protects the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."[4] These protections extend "to searches and seizures by state officers, including public school officials."[5] An otherwise unconstitutional search may be constitutional, however, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[6] In Milligan v. City of Slidell,[7] we held that "students in the school environment have a lesser expectation

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[3] Shipp v. McMahon, 234 F.3d 907, 911 (5th Cir. 2000).

[4] Milligan v. City of Slidell, 226 F.3d 652, 654 (5th Cir. 2000) (citations omitted).

[5] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (citations omitted) (holding that the Fourth Amendment was not infringed by the school district's requirement of random drug-testing for all student athletes).

[6] Id. at 653.

[7] 226 F.3d 652.

of privacy than members of the population generally."[8]

The district court reasoned that the mere detention of the students for several hours was not sufficient to establish a Fourth Amendment violation in light of the school's custodial and tutelary responsibilities. Under all relevant circumstances herein we are compelled to agree. The reasonableness of search and seizure must be determined by balancing the interests of the government against the invasiveness of the search or seizure.[9] Given the totality of the circumstances surrounding the detention of appellants, we cannot say with the required certainty that the actions of the school officials and police herein were unreasonable. Accordingly, the district court did not err in its holding that appellees' interest in maintaining the safety of the other students outweighed appellants' Fourth Amendment rights in this sharply defined setting.

Fourteenth Amendment

The district court found that the appellants failed to assert a Fourteenth Amendment claim because their allegations only gave rise to a claim under the Fourth Amendment. We have held that a substantive due process claim does not exist where the allegations of a civil rights complaint assert illegal arrest and detention.[10] A review of the complaint clearly discloses that they do not raise a Fourteenth Amendment claim.[11]

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[8] Id. at 655.

[9] Id. at 654.

[10] Blackwell v. Barton, 34 F.3d 298, 302 (5th Cir. 1994).

[11] Id. (holding that a claim against a government official, or a government body itself, for arrest without probable cause is properly

Leave to Amend

Appellants maintain that the district court erred in denying them leave to amend a social time. We review the denial of a motion to amend for abuse of discretion.[12] The record before us does not reflect that they requested such leave to amend or that it was denied. Accordingly, we cannot and will not review that issue. Having determined that appellants failed to state a constitutional violation, we do not reach the issue involving a claimed custom or policy.

The judgment of the district court is AFFIRMED.

Judge Stewart concurs in the judgment only.

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considered under the Fourth, rather than the Fourteenth Amendment).

[12] Whitaker v. City of Houston, 963 F.3d 831, 836 (5th cir. 1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LISA STOCKTON, as next friend of JEREMY DOUGLAS HILL, et al.	)	CIVIL ACTION NO. G-00-744
Plaintiffs,	)	
v.	)	
CITY OF FREEPORT, TEXAS and BRAZOSPORT INDEPENDENT SCHOOL DISTRICT	)	
Defendants.	)	

FINAL JUDGMENT

For the reasons set forth in the Order issued this date, Defendants' Motions to Dismiss are hereby GRANTED and Judgment is entered for Defendants. All parties are ORDERED to bear their own costs and attorney's fees incurred herein to date.

THIS IS A FINAL JUDGMENT.

IT IS SO ORDERED.

DONE this 14th day of May 2001, at Galveston, Texas.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

LISA STOCKTON, as next friend of JEREMY DOUGLAS HILL, et al.	)	CIVIL ACTION NO. G-00-744
Plaintiffs,	)	
v.	)	
CITY OF FREEPORT, TEXAS and BRAZOSPORT INDEPENDENT SCHOOL DISTRICT	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS

This case involves alleged deprivations of Plaintiffs' rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Now before the Court are the Motions to Dismiss for Failure to State a Claim urged by both Defendant City of Freeport ("City") and Defendant Brazosport Independent School District ("Brazosport I.S.D."). For the reasons set forth in more detail below, Defendants' Motions are GRANTED.

I. BACKGROUND

Solely according to the Plaintiffs[1], in the spring of 1999, Plaintiffs Jeremy Douglas Hill, Lucas Gallagher and Courtney Cours[2] attended Brazosport High School ("School") in Freeport, Texas. Each was a sophomore. None knew each other well, although they did eat lunch together and seemingly traveled in the same circles. Then a series of events transpired that brought these three students together in the lawsuit now extant in this Court.

On April 27, 1999, it is alleged that fourteen students at the School were confronted by officers from the Freeport Police Department. These students, including Plaintiffs, were frisked, handcuffed and led out of the School building. The officers placed the Plaintiffs in police cars, by which they were transported to the Freeport municipal building, which houses the local municipal court. During this process, the police officers allegedly directed profane language at Plaintiffs. Neither officers nor School officials articulated any reasons for the detention. Moreover, the police threatened the students with immediate imprisonment if they did not capitulate to the officers' authority; threatening to place the students in the municipal jail where they would suffer mightily at the hands of the facility's resident population. No students, however, were actually placed in jail cells. Instead, the police ordered that the students remain in the courtroom of the municipal building, upon threat of five year prison terms for leaving. These confrontations and subsequent detentions each took place without a warrant.

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[1] Because this is a Motion to Dismiss, the Court accepts all of Plaintiffs' pled facts as true. The School and the City strongly dispute the truth of much of the following recitation.

[2] Miss Cours, a minor, brings suit through her next friend, George Larry Cours.

After spending more than one hour in the courtroom, the students were told to telephone their parents and tell them to come down to the municipal building. Eventually, the students' parents arrived. The parents were told to sit and wait with their children in the courtroom. Ultimately, after all the parents had arrived, the police and the School's principal, Mr. Boone, hostily lectured both the students and their parents, after which all departed.

Only one of the Plaintiffs, Jeremy Douglas Hill ("Jeremy"), was ever questioned by the police. According to the Plaintiffs, this questioning only occurred because Jeremy's mother insisted that she could wait no longer in the courtroom and had to leave with her son. Otherwise, Jeremy and his mother would simply have remained in the courtroom awaiting the same abusive lecture that the other students and parents shortly received. In his brief interrogation, a detective asked Jeremy if he knew how to make a bomb, Jeremy said no, after which the detective proceeded to explain how to do so. Thereafter, the detective went on to inform Jeremy that he knew Jeremy had done nothing wrong. The detective further apprised Jeremy that this entire exercise had been a show of force, intended to impress upon the students that they were being monitored by the authorities.

But as unfortunate as these affairs are, this entire incident at Brazosport High School occurred against the backdrop of an even more calamitous tapestry of events that has permeated American culture in recent years. Three days after two students at Columbine High took the lives of thirteen classmates, a threatening letter was found in the Brazosport High School computer room. The School suspected that a particular student had left the letter. This School knew that the suspect spent idle time at the same group of picnic tables at which the Plaintiffs and the other arrested students often congregated. This knowledge, even with little or no further connection, allegedly triggered the actions which led to the raid and

detention of which Plaintiffs now complain.

Plaintiffs now allege that this confrontation and detention effected by the School, in conjunction with the local police, had no basis in the realities of who had or had not taken what actions at the School. According to the Plaintiffs, they, and the other arrested students, were singled out because they "hung out" at a particular set of picnic tables before classes and at the lunch hour. Plaintiffs maintain that this information exposes this damaging charade as lacking probable cause or even reasonable suspicion, and that no one believed that the individual Plaintiffs posed a legitimate risk of danger to the School.

The morning after the raid, Mr. Boone, the principal, called a school-wide assembly to explain the prior day's happenings. At this assembly, Mr. Boone pronounced the school free of terrorists and assured the students that all was safe. Mr. Boone further informed the student body that no one should bother the students who had been arrested the previous day, as these students had done nothing wrong. This admonition, however, has apparently had little effect.

Each of the Plaintiffs complains of harassment that began following their detention. For example, fellow students suggested invidiously that the Plaintiffs were contemplating a "Columbine-style" incident for the school. Jeremy twice received in-school suspension following his efforts to exonerate himself before the students in his geometry class. All the Plaintiffs allegedly began suffering sleeplessness and depression. Their school work suffered. Each became fearful of future arrest.

On May 5, 1999, in a state of confusion, agitation and fatigue, Jeremy fell asleep in a class, only to be aroused by a glass of water thrown upon his person by the teacher.[3] This led to riotous

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[3] While inappropriate, this does not rise to the level of a

laughter, causing Jeremy further humiliation and embarrassment. After this incident, Jeremy's mother scheduled a meeting with Mr. Boone. At this meeting, Mr. Boone told Jeremy's mother, and Lucas Gallagher's mother who was also present, that their children would be better off if they transferred to a different school or began home schooling.[4] Indeed Plaintiff Courtney Cours ultimately did leave the School, opting to pursue home schooling in lieu of facing the daily pressures brought on by their unrelenting peers.

Plaintiffs now contend that the actions of the City of Freeport police and School officials violated their rights guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution.[5]

II. DISCUSSION

A. *Motion to Dismiss Standard*

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the Court accepts as true all well-pleaded allegations in the complaint, and views them in a light most favorable to the plaintiff. See Malina v. Gonzales, 994 F.2d 1121, 1125 (5th Cir. 1993). Unlike a motion for summary judgment, a motion to dismiss should be granted only when it appears without a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46, 78

Constitutional violation. The Court includes this in the background facts as just that, background.

[4] Again, while callous, this is not a Constitutional violation.

[5] Plaintiffs' Original Complaint also alleged a violation of their First Amendment rights and stated several state law causes of action. Plaintiffs' First Amended Original Complaint omits these claims.

S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir.1994). The United States Court of Appeals for the Fifth Circuit has noted that dismissal for failure to state a claim is disfavored and will be appropriate only in rare circumstances. See Mahone v. Addicks Util.Dist.of Harris County, 836 F.2d 921, 926 (5th Cir.1988). "However, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993).

B. *A Constitutional Violation?*

The Fourth Amendment protects persons against unreasonable searches and seizures.[6] See Milligan v. City of Slidell, 26 F.3d 652, 654 (5th Cir. 2000). "The central inquiry under the Fourth Amendment is whether a search or seizure is reasonable under all the circumstances of a particular governmental invasion of a person's personal security." Id. Courts undertake this reasonableness assessment by balancing the interest of the government against the search or seizure's invasiveness. See id. This "[b]alancing renders essential a consideration of the context in

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[6] Plaintiffs protest Defendants' characterization of their claims as arising exclusively under the Fourth Amendment, rather than the Fourteenth Amendment. In support, Plaintiffs cite to several cases which hold that the Fourth Amendment is applied to states via the fourteenth Amendment. This is axiomatic. Defendants actual argument, however, is that the Court must apply a Furth Amendment analysis to this case, rather than using the Fourteenth Amendment's more generalized notions of due process. This is correct, and the Court proceeds accordingly. See Blackwell v. Barton, 34 F.3d 298, 302 (5th Cir. 1994).

which a Fourth Amendment right is asserted." Id. Therefore, both the magnitude of the threat involved and the quarters in which the threat may manifest bear on the governmental interest inquiry. Cf. Florida v. J.L., 529 U.S. 266, 273-74, 120 S.Ct. 1375, 1380, 146 L. Ed. 2d 254 (2000) (noting factors that might make a search based upon an otherwise unreliable anonymous tip reasonable). Indisputably, the Fourth Amendment does apply, albeit with generally lesser force, in schools. See Veronia School Dist. 47J v. Acton, 515 U.S. 646, 656-57, 115 S. Ct. 2386, 2392, 132 L. Ed. 2d 564 (1995). Thus, in undertaking a reasonableness inquiry, courts must consider the school's "custodial and tutelary responsibility for children." Id. at 656, 115 S. Ct. at 2392.

The Court assumes for purposes of this Motion to Dismiss, that Plaintiffs have demonstrated a strong interest in being free from the frisking, handcuffing and subsequent detention that took place. These invasions certainly are a far cry from de minimis and call for scrutiny. The Court's inquiry thus focuses upon whether, on the facts as pled, Defendants have demonstrated as a matter of law that the Plaintiffs' strong interest in being free from seizure has been indisputably outweighed by a governmental interest.[7] In this regard, the Court focuses upon two issues: (1) the nature and immediacy of the governmental concern and (2) the efficacy of the means used to

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[7] Plaintiffs argue that the Court should segregate the actions taken by the police from those of the School officials. This effort is aimed at removing the actions from a "special needs" analysis. The Court declines to parse through the actors in such a fashion. See Milligan, 226 F.3d at 654-656 (analyzing the conduct of police officers under the same special needs analysis). To the extent that a government interest exists and the actions are reasonable, it is of no import what state actor took the actions. But cf. New Jersey v. T.L.O., 469 U.S. 325, 335, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (declining to reach this question).

address the concern. See Milligan, 226 F.3d at 655.

The facts pled by Plaintiffs indicate that a threatening letter had been found on school property several days prior to the claimed Constitutional deprivations. The School suspected that a particular student had left this letter, and believed, based upon outward appearances, that Plaintiffs and the suspect were socially connected. It is difficult to conceive of a scenario in which a greater governmental interest is invoked than the threat of indiscriminate violence at school.[8] See id. (characterizing protecting students, fostering self-discipline and deterring possible violence as compelling governmental interests). Indeed, officials in the Columbine massacre were harshly criticized for failing to take action regarding prior signs of problems.

Somewhat unclear here, however, is the immediacy of the School's concerns. Plaintiffs argue that School officials found the threatening letter several days previously, and thus the urgency that might otherwise justify such a search or seizure is lacking here. The Court finds itself unpersuaded by this contention. Faced with a situation like this, a school always has latitude regarding how quickly to act. Investigations and subsequent remediations are incremental. One could posit a situation wherein a violent threat is lodged for a specific date several weeks in the future. Would a

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[8] Plaintiffs, in their Response, rely heavily upon a recent District Court decision from the Northern District of Texas. See Tannahill v. Lockney Indep. Sch. Dist., 2001 WL 210394 (N.D. Tex. March 1, 2001). The Tannahill case involved mandatory suspicionless drug testing of all secondary school students in the Lockney Independent School District. See id. Applying the Supreme Court's Vernonia analysis, the District Court found that no "special need" justified this testing. See id. The factual dissimilarities between Tannahill and the case now before this Court, however, are dramatic. Accordingly, the Court gives Tannahill little heed.

school's efforts to avert injury be less justifiable if undertaken after two days time; two weeks time; the morning of the anticipated harm? This Court thinks not.

Furthermore, it is both the nature and immediacy of a concern that give rise to a government's interest in preventing its occurrence. Even if one were to concede an utterly nominal level of immediacy, the nature alone of a violent threat advanced against a school provides an ample government interest to support acting forcefully to stem even the possibility of violent conduct, although the Court fervently hopes that events such as those at issue will not become a common occurrence in this or any school system.

The effectiveness of the School's and the police department's actions also cannot be questioned. No violent attack came to bear at Brazosport High School. Clearly, of course, a less intrusive means could, and in hindsight likely should, have been used to assemble the Plaintiffs and other students. They could have been called to the principal's office, frisked for weapons in private and then placed in an unused classroom until their parents arrived for a lecture. However, the Fourth Amendment does not require that a search or seizure be conducted in the least restrictive means. See Milligan, 226 F.3d at 655. Rather, the alleged personal invasion as completed must be reasonable under all the circumstances.

The bottom line is that the rights asserted by Plaintiffs, although legitimate and substantial, do not outweigh the School's dramatically compelling interests in maintaining a safe place of learning.

C. *Policy or Custom?*

Because the Court has determined that Plaintiffs' Complaint does not state a cause of action for Constitutional deprivation, the Court truncates its analysis of whether a policy or custom of the

City or the Brazosport I.S.D. caused the alleged deprivation.[9] Suffice it to say, however, that Plaintiff's Complaint also fails to allege, much less factually describe, a policy or custom which led to a Constitutional deprivation. See Spiller v. City of Texas City, 130 F.3d 162, 167 (5th Cir. 1997) ("The description of a policy or custom and its relation to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts.").

III. CONCLUSION

After examining the Plaintiffs' allegations, the Court is firmly convinced that no Constitutional claim has been stated. Taken as true the allegations demonstrate, at best, insensitive, heavy-handed actions, and at worst, bumbling hysteria on the part of both the School and the police officers. In other words, what occurred at the School was, at most, an extraordinary overreaction. However, in the aftermath of the Columbine High violence, some period of hypersensitivity among schools officials was called for, and indeed should be lauded. In the face of a genuine nationwide tragedy, which has been mimicked at other schools, and with which we all therefore continue to struggle, it simply is not improper to overreact. Thus, while the Court is hardly amused by what transpired, it readily concedes that school officials have little or no expertise in anti-terrorism and are largely left to "making it up as they go along." Accordingly, this Court will not unduly second guess the decisions of school administrators and law enforcement officials who are working within the umbra of such a demonstrably gut wrenching tragedy. The alternative is an increased risk of further calamity.

While never taking lightly the infringement of anyone's rights, particularly when those of tender age are involved, this Court

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[9] Plaintiffs have not sued any persons in their individual capacities.

reluctantly approves of the actions taken by these School officials and police officers. Part of living in a free republic is the ongoing preponderance of reaction to dangerous situations rather than proaction. Here, an effort was made to avoid the degenerative spiral into violence that reaction often fosters, or at least fails to stem. Unfortunately, when officials act with enthusiastic force in the face of a palpable concern, individuals will occasionally be snared in a regrettably broad, but not unreasonably intrusive trap.

Of course, the Court readily concedes that a bright line exists over which the facts of a similar scenario could cross and give rise to a claim for relief. For example, students could be beaten, falsely charged with a crime, or jailed indeterminately. However, the Plaintiffs herein were not physically injured. They were not incarcerated. They were not charged with a crime. Indeed, their records are clean. The mere detention of fourteen students for several hours simply does not approach this bright line.

After careful consideration of the Plaintiffs' allegations in light of the applicable law, the Court finds that none have stated a factual scenario for which relief may be granted. Accordingly, Defendants' Motions to Dismiss are GRANTED. The Court ORDERS that each and all of Plaintiffs' claims versus Defendants are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DONE this 14th day of May 2001, at Galveston, Texas.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JEREMY DOUGLAS HILL, LUCAS GALLAGHER, and GEORGE LARRY COURS, as next friend of COURTNEY COURS, a minor	)	CIVIL ACTION NO. G-00-744
	)	JURY TRIAL DEMANDED
Plaintiffs,	)	
v.	)	
CITY OF FREEPORT, TEXAS and BRAZOSPORT INDEPENDENT SCHOOL DISTRICT	)	
Defendants.	)	

PLAINTIFFS' FIRST AMENDED
ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW LUCAS GALLAGHER, JEREMY DOUGLAS HILL, and GEORGE LARRY COURS, as next friend of COURTNEY COURS, a minor, as plaintiffs herein and files this, their First Amended Original Complaint and as grounds thereon would show the Court as follows:

JURISDICTION AND VENUE

1. This action is brought under the First, Fourth and Fourteenth Amendments of the Constitution of the United States and the United States Code, Title 42, Section 1983.

2. Venue is proper in the Galveston, Texas Division of the United States District Court for the Southern District of Texas because all action giving rise to the cause of action took place in Freeport, Brazoria County, Texas.

PARTIES

3. Plaintiff, Lucas Gallagher was a minor child at the times that the events that form the basis of this litigation took place. Since the filing of the original complaint, Lucas Gallagher has attained the age of majority and proceeds in this lawsuit on his own behalf. Lucas Gallagher resides in Brazoria County, Texas.

4. Plaintiff, Jeremy Douglas Hill, was a minor child at the times that the events that form the basis of this lawsuit took place. Since the filing of the original complaint, Jeremy Douglas Hill has attained the age of majority and proceeds in this lawsuit on his own behalf. Jeremy Douglas Hill resides in Brazoria County, Texas.

5. George Larry Cours is the parent and legal guardian of Courtney Cours, a minor child. Both Mr. Cours and Courtney Cours reside in Brazoria County, Texas.

6. The City of Freeport is an incorporated city in the State of

Texas and can be served by serving its city secretary at the Freeport City Hall, 200 W. Second Street, Freeport, Brazoria County, Texas 77541.

7. Brazosport Independent School District is a governmental entity and can be served by serving its president, Gerald Anderson, Brazos Independent School Board, P.O. Box Z, Freeport, Brazoria County, Texas 77541.

FACTUAL BACKGROUND

8. During the school year of 1998-1999 Jeremy, Courtney and Lucas were sophomores Brazosport High School in Freeport, Texas. Plaintiffs had a small group of acquaintances that they visited with, mostly at school after they arrived at school in the morning but before the school building was opened. Plaintiffs often have lunch together but at least as far as the three plaintiffs concerned, they did very little socializing with the other students who utilized the picnic tables or each other after school hours or off campus. Although they regularly sat together before school and at lunch, the Plaintiffs were not particularly close friends with any of the students and in fact, were only passing acquaintances with each other.

9. Both Jeremy and Lucas come from single parent households or at least families where their biological parents have divorced and remarried. Prior to the incidents that are the subject of this lawsuit, both boys had received mental health counseling to deal with depression and general adolescent problems that sometimes seem overwhelming to young people who are different from the

other children at school and therefore not particularly very sociable or popular. Neither Jeremy nor Lucas had any criminal record and usually stayed very close to home when not at school. Courtney's parents lived together at the time of the complained of incident and Courtney had no prior history of mental health counseling. Courtney had very good grades and was active in several school activities. Before the end of the Spring 1999 terms, both Jeremy and Lucas had qualified to take college level computer programming courses through the high school and the local junior college and were fairly serious students who were trying to do well in school and better their situation of growing up of very modest means in Freeport, Texas by working hard in school and earning as much college credit as possible while still in high school.

10. Prior to April 1999, neither Lucas, Courtney, nor Jeremy had been to the other's home for any reason until after April 27, 1999. In fact, Jeremy and Lucas did not even know each other's last names before that date. While some of the other students in the group that sat at the picnic tables had socialized after school with Lucas on a very limited basis, Jeremy really did not know any of the students very well and had neither been to any of their homes or had them over to his home. Additionally, while Lucas would occasionally socialize with the other students after school, Jeremy always limited his socializing to this family, spending his weekend evenings at home playing card games and watching television with his siblings and mother. Courtney also had limited social contact with the other students that congregated at the picnic tables outside of school.

11. In other words, although many of the students who were members of what might be termed identifiable social cliques at Brazosport and, including students who were members of official gangs, would sometimes refer to Plaintiffs and the other students who congregated around the picnic tables in the mornings as, weird, odd, arty (in a derogatory manner), and labeled the group the Korn Club, in fact, there was no club or even a social order to the group of students. The students who did not sit around the picnic tables labeled those students that did sit there in the mornings and at lunch, the Korn Club in a derogatory manner because the band Korn is known for its dark, depressing lyrics. Plaintiffs did not regularly refer to themselves as Korn Club members and are not aware that any such group even existed as a group, while they were at Brazosport. Instead, Lucas, Jeremy, Courtney and the other students they associated with are basically just students who happened to sit at the picnic tables and had shared interests in more esoteric ideas than what the football team might be doing or who was dating who or what kind of gang mischief they could engage in during and after school.

12. On April 27, 1999 however, things changed dramatically to make the group much more identifiable and isolated from the rest of the student population. On that date, fourteen students, including Courtney and Lucas, were either called out of class and frisked and handcuffed by police from the Freeport Police Department at what appeared to be the direction of Douglas Boone, the principal of Brazosport High School. Jeremy was seized by the police after Mr. Boone pointed him out to police as Jeremy was walking through the hallway during break period. Like Lucas and

Courtney, frisked and handcuffed by the police and lead out of the school building. All three students were taken into police custody, believing that they were under arrest and forcibly taken out of school building, forced into the waiting police cars and transported by Freeport police to the municipal building where the municipal court is located. The students were arrested without a warrant and with the assistance of and, from all outward appearances, the direction of, Douglas Boone, the Brazosport High School principal, allegedly acting at the behest and with the concurrence of the Brazosport School Board. Throughout the process, the police officers called the students being arrested, including Jeremy, Lucas, "jackasses", "assholes", and "punks". Jeremy was told by one of the arresting officers, "boy, I don't care if you did anything or not, so get your ass on that wall and shut up!". The police officers refused to explain to the Plaintiffs what the basis for their arrest was and threatened the Plaintiffs with immediate imprisonment in the city jail if they did not submit to the demands of the police. The police took every measure necessary all three Plaintiffs by telling them if they were put in a cell in the city jail, they would be sorry because they would suffer the further indignities of being abused by fellow jailmates. Although the officers refused to tell Courtney, Jeremy and Lucas what crimes they had supposedly violated, that had brought about their arrests, the officers told the Plaintiffs and the other students being held against their will at the municipal court that they were facing prison terms of five years if they attempted to leave the police station and municipal courtroom. The arrests and harassment and intimidation took place in the classrooms and hallways of the school in full view of other

students and the faculty. Prior to being arrested, neither Courtney, Jeremy nor Lucas had been asked if they had any knowledge regarding the purportedly threatening letter that was left in the computer room several days before their arrests.

13. Once Courtney, Jeremy and Lucas were at the police station, they were placed in the justice of the peace courtroom and told to sit and not speak. they were again threatened with jail and imprisonment if they spoke to anyone or attempted to leave. After being unlawfully detained for over an hour, the boys were told to call their parents and tell them that they had been arrested and that the parents needed to come to the jail to deal with the matter. Neither Jeremy, Courtney, nor Lucas believed that they were free to leave the courtroom or the building without facing rearrest and five years of imprisonment.

14. When their parents arrived at the jail, the parents were told to sit and wait with the students in the justice of the peace courtroom. After Ms. Stockton sat with her son Jeremy for a while, she told the officers that she had to leave and take Jeremy with her. Ms. Stockton attempted to find out what the reason for Jeremy's arrest had been but noone would explain it to her. After Jeremy answered a few questions dealing with whether or not he knew how to make a bomb, Ms. Stockton was allowed to leave with Jeremy. When Jeremy informed the officer he did not know how to make a bomb, the officer told him how it could be done. The questioning was not specifically related to the note left at the school several days before or about Jeremy's relationship to the student thought to have left the

note or about any conspiracy to ambush the school and lasted no more than two or three minutes. In the conversation that Jeremy and his mother had with the detective, the detective stated that he knew Jeremy had done nothing wrong and that Jeremy and the others had been arrested and brought to the police station as a show of force by the police and the school administrators. The officer stated that the authorities wanted to impress on the students that they were being watched and were under the control of the authorities.

15. When all of the parents had arrived, the parents and students were then lectured and yelled at in a very hostile tone by both police officers and Mr. Boone. Caroline Thomas and Lucas Gallagher and Courtney and her parents sat through the abusive lecture as they had been instructed to do, fearing that if they left they would both face some criminal charge. Neither Courtney or Lucas were individually questioned about anything. From the nature of the event, it was clear that had Jeremy and his mother been available to sit through the insulting statements made by the authorities to the entire group, Jeremy would not have been asked any specific questions.

16. It was clear from the events that transpired at the municipal court building that the police had absolutely no probable cause to have arrested and detained any of the Plaintiffs and that Mr. Boone and other school officials who participated in the police action had no basis for forming a genuine, reasonable belief that the Plaintiffs posed any risk of danger to the school, other students or faculty members.

17. The complete lack of any probable cause and/or reasonable suspicion by the police and school authorities that Jeremy and/or Lucas and/or Courtney had been engaged in any criminal conduct became even clearer the next morning when Mr. Boone called a school wide assembly and announced to everyone in attendance that the school was free of terrorists and all was safe. Mr. Boone stated that the students had been arrested the day before had done nothing wrong and told the assembled body that if anyone bothered the students that had been arrested, Mr. Boone would "Nail your butts to the wall."

18. Before the assembly, Caroline Thomas and her son met with Mr. Boone in his office to discuss why Lucas had been arrested. Mr. Boone stated that Lucas had been arrested and held in custody because he sat with a particular group of students before school and at lunch. Mr. Boone claimed that he had acted on advice of the Freeport police, the Federal Bureau of Investigation and the Federal Bureau of Alcohol, Tobacco and Firearms and that Lucas was guilty because he associated with the boy who had left the letter in the computer room a week before. Mr. Boone could not state exactly what it was guilty of, but instead insisted that under the "special circumstances" normal school procedures and policies did not apply. Mr. Boone told Lucas and his mother, "Lucas, I am using you and your group as an example. That I don't take any bull, I run a tight ship, a good school." Mr. Boone had no specific information about what the special circumstances were that warranted a complete abrogation of the students' civil rights or how Lucas fit into the special circumstances except where he choose to eat his lunch or

pass time in the morning before the school opened the buildings.

19. The trouble for Lucas, Jeremy, and Courtney did not stop at the assembly. Shortly after the assembly, students who had not been arrested started making suggestive comments to Jeremy and Lucas causing both boys shame and embarrassment. Courtney regularly experienced similar conduct and the results were just as devastating to her life. The student comments were of the nature, "Don't shoot me", suggestive of the idea that in some way, Courtney, Lucas and/or Jeremy might take actions similar to the boys in Littleton, Colorado who had massacred their fellow students at their high school. When some students asked Jeremy who he had been arrested, Jeremy's geometry teacher wrote Jeremy up for disciplinary action and sent him to the principal's office. Jeremy ended up being given an in school suspension for the day simply for responding to the students' inquiries and stating that he had done nothing wrong to have caused his arrest the day before. The students who had brought the matter up were not disciplined in any way. When Ms. Stockton called the school the next day and complained about the disciplinary action against Jeremy, he was again placed on in school suspension.

20. Courtney, Jeremy and Lucas continued to be ridiculed and tormented by fellow students, who would make remarks about them being mad bombers. As a result, the pressure on the Plaintiffs caused them serious problems including sleeping problems and concerns about being in public and leaving the house. All three Plaintiffs grew increasingly

depressed. Their school work suffered from the pressure from the other students and being labeled as potential school terrorists and they were fearful of future arrests by various governmental bodies, including the FBI, ATF and the Freeport police. Courtney dropped out of attending school and began being home schooled to avoid the peer pressure. At one point, Courtney attempted to attend an after school function that was to honor students, including herself. At the function, Courtney became so overwhelmed by shame and fear that she had to leave in a state of panic. Courtney had to begin therapy in an effort to learn to cope with her feelings brought on by the unlawful actions of the police and school officials. To this day, Courtney continues to be home schooled because she cannot bear to be in a school setting.

21. More trouble followed when on May 5, 1999 Jeremy dozed off in class. Jeremy had not been able to restfully sleep since his arrest and was confused and agitated throughout the days and nights due to the stress of having been arrested and wrongfully accused of being a school bomber or terrorist by the school principal and Freeport police. When Jeremy fell asleep in his class, he was assaulted by the teacher who threw a glass of water on him. The teacher, Mr. Yarberry threw the water on Jeremy in front of the rest of the class, causing Jeremy further humiliation and embarrassment. The students broke out into riotous laughter as Jeremy was humiliated and degraded by Mr. Yarberry's actions. Mr. Yarberry's actions were, however in keeping with the lawless manner in which Mr. Boone ran the school and the lack of training and leadership at the school.

22. After calling the school and complaining to the assistant principal, Ms. Stockton was asked by Mr. Boone to come to the school for a meeting. Ms. Stockton took Ms. Thomas as a witness and when Ms. Thomas attempted to take minutes of the meeting, she was told that she would either have to leave the meeting or stop taking notes. Both mothers were then informed that their sons should be kept at home and home schooled to avoid future problems. Mr. Boone made it clear that neither Jeremy nor Lucas, both of whom had been recognized as being very bright students, would be better off either at a different school or at home. Courtney's parents also complained about what had happened to their daughter and Mr. Boone encouraged Courtney's parents to take her out of school and home school her. As a direct result of the actions of Mr. Boone, other school administrators and the Freeport police, Courtney did discontinue attending school and now relies on home school to obtain her school degree. It was clear that Mr. Boone wanted the Plaintiffs removed from his school because they had parents who supported them and believed that their children had been seriously wronged by the school administration and local police and that the officials must be held accountable.

23. As a direct and proximate cause of the illegal actions taken against them by the City of Freeport and Brazoport Independent School District, Jeremy, Courtney and Lucas have suffered emotional damages that have increased their sense of isolation and fear of the public, the police, school authorities, and from fellow students. Additionally, they have suffered depression, insomnia, a sense of shame, and feelings of loneliness that no child should have to

experience and certainly something that the school officials and police should have foreseen as a natural consequence of the actions arresting students out of the classroom, spiriting them off to the city jail in hand cuffs, holding them against their will, threatening them with long periods of incarceration, suspending them from school for being the target of and responding to hateful comments made by fellow students having already been stigmatized by the school principal, and then asking their mothers to remove them from school permanently so that the school administration would not have to answer for violating the Plaintiffs' civil rights because they were targeted for associating with a loosely identifiable group of students, to wit, students who sat at certain picnic tables during lunch and before school opened in the morning, who were considered moody and arty. Neither Jeremy nor Lucas had exhibited or engaged in any criminal activity prior to their arrest and no criminal charges were ever filed against the Plaintiffs. Instead, Jeremy and Lucas were informed that they were arrested and illegally detained because of the people they associated with and the fact that they listened to certain music.

FIRST CAUSE OF ACTION-FOURTH AND FOURTEENTH AMENDMENT VIOLATIONS

24. Plaintiffs incorporate by reference all of the foregoing allegations contained in paragraphs 1 through 23 here in above as if fully set forth below and as further cause of action state as follows:

25. The arrests and detention of Jeremy and Lucas was in clear

violation of their Fourth Amendment right protecting them from unlawful search and seizure and a denial of their rights to due process. In this case, the defendants claim that they had reasonable basis for arresting and detaining the boys based on the statements made by three fellow students. The police however, in clear violation of state law regarding warrantless arrests did not obtain an arrest warrant for either Jeremy or Lucas before arresting them. Neither boy was in the process of committing a crime at the time of their arrests and neither boy posed any immediate danger to anyone at the school or anywhere else for that matter. There was no probable cause or reasonable basis to selectively isolate and search the boys and take them into custody. In fact, once the parents of the students arrived at the police station, the school and police officers responsible for the unlawful arrests could not articulate any particular reason for why each child was taken into custody. Instead, the principal of the school and the police attempted to intimidate and bully the parents and the students, including the plaintiffs herein, into waiving any rights that the students had to be free of unlawful police action.

26. The officers and Mr. Boone were acting without probable cause, without reasonable belief that the community was at any risk of danger, without any lawful basis for their actions and in fact, clearly outside of the scope of the state law concerning warrantless arrests. Instead, Mr. Boone, acting with the advice and consent of the school board of BISD, made a freewill choice to violate his position of trust and authority in the community and abuse his power as a school official. Mr. Boone's actions were taken because of weak

and poor management by the school board who allows Mr. Boone free reign to operate the school at his discretion even at the expense of the students' civil rights. The police force in Freeport lacked proper training and supervision acted with impunity for the rights of the citizens of Freeport who happened to also be students at Brazosport High School. The actions of all of the defendants in this case were clearly in bad faith and were done with deliberate indifference to the health, welfare and rights of Jeremy and Lucas, with no regard for the long term consequences labeling these boys, even for a few hours, dangerous snipers or bombers or associating the Plaintiffs with conduct that implies that they are dangerous snipers/bombers, or school terrorists.

27. The actions of all of the defendants were clearly and completely in violation of Jeremy's and Lucas's rights to due process and to be free of unlawful search and seizure under the Fourth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983.

28. As a direct and proximate cause of the defendants actions, Plaintiffs have had to retain the services of an attorney to represent them in this matter and become obligated for the costs of this litigation and attorneys fees.

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray that after a trial on the matters outlined above, Plaintiffs be awarded damages as follows:

1. Any and all damages in an unspecified amount Plaintiffs' may be entitled to for the violation of their civil rights under

42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution;

2. Prejudgment Interest on any damages awarded;

3. Post judgment interest on any damages awarded from the date of judgment until the judgment is paid in full;

4. Reasonable and necessary attorneys' fees pursuant to 42 U.S.C. § 1983;

5. Such other and additional damages to which Plaintiffs may be justly and legally entitled to receive as a result of the defendants' wrongful conduct and unlawful conduct.

Respectfully submitted, .

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ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JEREMY DOUGLAS HILL, KAY GALLAGHER, and GEORGE LARRY COURS, as next friend of COURTNEY COURS, a minor	)	CIVIL ACTION NO. G-00-744
Plaintiffs,	)	
v.	)	
CITY OF FREEPORT, TEXAS and BRAZOSPORT INDEPENDENT SCHOOL DISTRICT	)	
Defendants.	)	

DEFENDANT BRAZOSPORT INDEPENDENT SCHOOL DISTRICT'S FIRST AMENDED ANSWER

TO THE HONORABLE JUDGE OF THE COURT:

Defendant Brazosport Independent School District ("Brazosport ISD or District") submits its First Amended Answer subject to and without waiving its First Amended Motion to Dismiss for Failure to State a Claim For Which Relief Can be Granted, as follows:

I.

DEFENDANT BRAZOSPORT INDEPENDENT SCHOOL DISTRICT'S FIRST AMENDED ANSWER

Jurisdiction and Venue

1. Defendant denies Plaintiffs' action is brought under the First Amendment to the Constitution. Plaintiffs' have not stated a cause of action under the First Amendment in their Amended Complaint. Defendant admits the remaining allegations in this paragraph.

2. Defendant admits that venue is proper in the Galveston Division of the United States District Court for the Southern District of Texas. Defendant admits that all of the actions giving rise to this cause of action took place in Freeport, Brazoria County, Texas.

Parties

3. Defendant admits the allegations contained in this paragraph.

4. Defendant admits the allegations contained in this paragraph.

5. Defendant admits the allegations contained in this paragraph.

6. Defendant admits the allegations contained in this paragraph.

7. Defendant admits that Brazosport ISD is a government entity. Defendant denies that Brazosport ISD can be served by serving its President. Brazosport ISD does not have a president; it has a Superintendent. Defendant denies that Gerald Anderson is the president of Brazosport ISD. Brazosport ISD's superintendent is Rudy Okruhlik. Defendant admits that the address of Brazosport ISD is P.O. Drawer Z, Freeport, Brazoria County, Texas 77541.

Factual Background

8. Defendant admits that Jeremy Hill, Lucas Gallagher, and Courtney Cours were sophomores at Brazosport High School during the 1998-99 school year. Defendant admits that the Plaintiffs often met with a group of other students at school prior to the beginning of the school day. Defendant admits that members from this group of students would often eat lunch together during one of the campus lunch periods. Defendant does not have sufficient information to admit or deny that the Plaintiffs visited with these students "mostly at school" or that the Plaintiffs "did very little socializing with these students or each other after school hours or off campus." In addition, Defendant does not have enough information to admit or deny that the Plaintiffs "were not particularly close friends with any of the students" or that the plaintiffs "were only passing acquaintenances with each other."

9. Defendant admits that Jeremy Hill enrolled in a drafting (DFPG1409) class at Brazosport College in the Fall of 1999 and earned a B in the class. Defendant also admits

that Jeremy enrolled in another drafting class (DFPG1405) at Brazosport College in the Spring of 2000 and earned an F. Defendant admits that Lucas Gallagher enrolled in a computer class (CSC11410) at Brazosport College in the Fall of 1999 and earned an A. Defendant also admits that Lucas enrolled in another computer class (WDPR1310) at Brazosport College in the Spring of 2000 and earned a B. Defendant admits that Courtney's parents lived together at the time of the complained of incident. Defendant denies that Courtney had good grades. Defendant admits that Courtney was involved in theater arts and dance during her freshman year. Defendant does not have sufficient information to admit or deny the remaining allegations in this paragraph.

10. Defendant does not have sufficient information to admit or deny the allegations in this paragraph.

11. Defendant admits that a social clique of students existed which some students labeled the Korn Club. Defendant also admits that the Plaintiffs were aware that a social clique of students existed which some students labeled the Korn Club, and also admits that the Plaintiffs often interacted with these students. Defendant does not have sufficient information to admit or deny the remaining allegations in this paragraph.

12. Defendant admits that on April 27, 1999, certain students, including Courtney and Lucas, were called out of class related to the investigation of a terrorist threat involving a written document left on the high school campus that stated "Death will come, not swiftly but very slow you will die

soon everyone will die soon in a fiery brutal death...Deathbird.(sic)." Defendant admits that certain students, including Courtney and Lucas, were frisked, handcuffed, and removed from the campus by the Freeport police, and transported to the municipal court building in Freeport. Defendant denies that Jeremy was seized by the Freeport Police at the direction of Douglas Boone, the principal of Brazosport High School. Defendant denies that the Plaintiffs were "arrested without a warrant and with assistance of and, from all outward appearances, the direction of, Douglas Boone, the Brazosport High School principal, allegedly acting at the behest and with the concurrence of the Brazosport School Board." Defendant denies that "t]he arrests and harassment and intimidations took place in the hallways of the school in full view of other students and the faculty." Defendant does not have sufficient information to admit or deny the remaining allegations of this paragraph.

13. Defendant does not have sufficient information to admit or deny the allegations in this paragraph.

14. Defendant does not have sufficient information to admit or deny the allegations in this paragraph.

15. Defendant denies that "[w]hen all of the parents had arrived, the parents and students were then lectured and yelled at in a very hostile tone by both police officers and Mr. Boone." Defendant does admit that Mr. Boone shared with the parents and the students the seriousness of the situation. Defendant denies the characterization of the information shared as "abusive" or "insulting." Defendant

does not have sufficient information to admit or deny the remaining allegations in the paragraph.

16. Defendant denies that Mr. Boone and the other school officials present did not have a "basis for forming a genuine, reasonable belief that the Plaintiffs posed any risk of danger to the school, other students or faculty members." Defendant does not have sufficient information to admit or deny the remaining allegations in this paragraph.

17. Defendant admits that in order to emphasize the seriousness of the matter, and to strongly encourage students not to behave inappropriately, Mr. Boone did state something along the lines that for students who disobeyed his instructions and directives, he would "Nail your butts to the wall" during his remarks at a school assembly. Defendant denies the remaining allegations in this paragraph.

18. Defendant admits meeting with Ms. Thomas and Lucas before the assembly and sharing with them information related to Lucas's interaction with certain students on campus before school and at lunch. Defendant further admits that Mr. Boone shared with Ms. Thomas and Lucas that he had received information, advice and direction from the Freeport police with respect to the investigation of the terroristic threat. Mr. Boone also shared with Ms. Thomas and Lucas that Lucas was associated with the student who had, in fact, made the terrorstic threat. Defendant further admits that Mr. Boone shared with Ms. Thomas and Lucas that special circumstances did exist in this situation in that the Freeport police were providing instructions related to

the investigation of the terroristic threat. Defendant denies that Ms. Thomas and Lucas were told by Mr. Boone, "Lucas, I am using you and your group as an example." Defendant does admit that Mr. Boone stated something along the lines that he runs a tight ship and a good school. Defendant denies the remaining allegations in this paragraph.

19. The Defendant admits that Jeremy's geometry teacher did send Jeremy to the office for a conference because Jeremy continued talking during class after repeated warnings by the teacher to stop. Defendant denies the remaining allegations in this paragraph or does not have sufficient information to admit or deny the remaining allegations in this paragraph.

20. Defendant admits that Courtney is currently home-based. Defendant does not have sufficient information to admit or deny that Courtney's home-based status is a result of the April 27, 1999 incident. Defendant does not have sufficient information to admit or deny the allegations in this paragraph.

21. Defendant admits that sometime after April 27, 1999, Jeremy slept in class, and the teacher did place a small amount of water on Jeremy's head to wake him up. Defendant denies the remaining allegations in this paragraph or does not have sufficient information to admit or deny the remaining allegations in this paragraph.

22. Defendant admits that Mr. Boone asked Ms. Stockton to conference with him regarding any outstanding concerns.

Mr. Boone did inform Ms. Stockton that the conference should be between Ms. Stockton and Himself, and Mr. Boone did later inform Ms. Stockton of other options available to her. Defendant admits that Courtney's parents complained about the April 27, 1999 incident to Mr. Boone. Defendant also admits that Courtney is currently home-based. Defendant denies the characterization "Mr. Boone encouraged Courtney's parents to take her out of school and home school her." Defendant admits that Mr. Boone advised Courtney's parents that in response to their concerns they could request a transfer, home-school Courtney, receive home-bound instruction, or select a home-base arrangement. Defendant denies the remaining allegations in this paragraph.

23. Defendant denies the allegations in this paragraph or does not have sufficient information to admit or deny the remaining allegations in this paragraph.

First Cause of Action-
Fourth and Fourteenth Amendment Violations

24. The allegations contained in paragraph 24 of Plaintiffs' Amended Complaint do not require a response from Defendant.

25. Defendant denies the allegations contained in this paragraph.

26. Defendant denies the allegations contained in this paragraph.

27. Defendant denies the allegations contained in this paragraph.

28. Defendant admits that Plaintiffs have retained counsel. Defendant denies the allegations contained in this paragraph

Damages

29. Defendant denies that Plaintiffs are entitled to any relief in this case, including the relief specified in subparagraphs 1 - 5 of the Prayer Section of Plaintiffs' Amended Complaint.

II.

AFFIRMATIVE DEFENSES

1. Plaintiffs' claims fail, in whole or in part, due to failure to exhaust administrative remedies.

2. Plaintiffs' claims fail, in whole or in part, under the doctrine of governmental immunity.

3. Plaintiffs' claims fail, in whole or in part, under the doctrine of estoppel.

4. Plaintiffs' claims fail, in whole or in part, because Plaintiff failed to mitigate damages.

5. Plaintiffs' claims fail, in whole or in part, by the applicable statute of limitations.

III.

PRAYER FOR RELIEF

The Brazosport Independent School District prays that this action be dismissed in its entirety and that the Plaintiffs recover nothing. Brazosport ISD has been formed to retain legal representation and incur legal expenses because of this lawsuit. Brazosport ISD, therefore, respectfully prays that it recover (1) judgment for its reasonable and necessary attorneys' fees; (2) costs incurred in the defense and prosecution of this case; and (3) any other relief, both general and special, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

Bracewell & Patterson, L.L.P.
ATTORNEYS FOR DEFENDANT
BRAZOSPORT INDEPENDENT
SCHOOL DISTRICT

Supreme Court, U.S.
FILED
OCT 18 '02
OFFICE OF THE CLERK

No. 02-448

In The
Supreme Court of the United States

JEREMY DOUGLAS HILL, LUCAS GALLAGHER, AND GEORGE LARRY COURS, AS NEXT FRIEND OF COURTNEY COURS, A MINOR,

Petitioners,

v.

CITY OF FREEPORT, TEXAS AND BRAZOSPORT INDEPENDENT SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT, CITY OF FREEPORT, TEXAS, BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Respondents, a municipality acting through its police force and a public school district, violated Petitioners' Fourth Amendment Rights.

LIST OF PARTIES

1. Jeremy Douglas Hill, Petitioner
2. Lucas Gallagher, Petitioner
3. George Larry Cours, as next friend of Courtney Cours, Petitioner
4. City of Freeport, Texas, Respondent
5. Brazosport Independent School District, Respondent

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STATUTES AND RULES

Fed. R. Civ. P. Rule 12(b)(6) 1

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STATEMENT OF THE CASE

Respondent, City of Freeport, Texas, directs the Court to the facts as outlined in the Opinion of the court of appeals. (Pet.App.B2-B3).[1]

SUMMARY OF ARGUMENT

Petitioners have presented no issue which merits this Court's attention. They have mischaracterized the question presented. Further, they incorrectly argue that the "special needs exception," in the school setting, is a developing area of the law and thus, this Court should therefore grant certiorari to determine whether the special needs exception is applicable under the specific facts of this case. Petitioners also argue that the Court of Appeals misapplied the law, which, most assuredly, is not a basis for granting a petition for writ of certiorari. SUP. CT. R. 10.

Petitioners' entire argument presumes that the "special needs exception" is not applicable under these specific facts involving high school students, and therefore, the Court of Appeals' misapplied *Vernonia School Dist. v. Acton*, 515 U.S. 646, 115 S.Ct. 2386 (1995). However, both the District Court and the Court of Appeals determined that Petitioners failed to state a claim for a constitutional violation by applying well-established law requiring the balancing of the Petitioners' constitutional rights and the

[1] In light of the 12(b)(6) standard of review, the facts described in the Court of Appeals' Opinion are simply those alleged by the Petitioners. The City of Freeport strongly disputes Petitioners' version of the facts.

governmental interest in preventing the possibility of violent conduct on a high school campus.

Equally important, even after finding that Petitioners had failed to state a constitutional claim, the District Court further analyzed Petitioners' Complaint and correctly determined that the Complaint did not "allege, much less factually describe, a policy or custom which led to a Constitutional deprivation." (Pet.App.D10). Absent such allegation, Petitioners' Complaint fails to state a claim. *See Spiller v. City of Texas City*, 130 F.3d 162 (5th Cir. 1997).

Additionally, Petitioners unsuccessfully attempt to fabricate a conflict between the Court of Appeals' decision and the Supreme Court's decision in *Board of Educ. of Indep. School District No. 92 of Pottawatomie County v. Earls*, ___ U.S. ___, 122 S.Ct. 2559 (2002). In reality, there is no conflict, and the Court of Appeals Opinion does not conflict with any decision from this Court or any other Circuit. Accordingly, Rule 10 jurisdiction is not invoked and this Court should deny the writ.

Finally, Petitioners argue that this case presents an important constitutional issue pertaining to the "special needs exception" as it applies to local law enforcement officers who act in conjunction with school officials. (Pet. for Cert. 14-16). However, the question of whether the "special needs" analysis applies to local law enforcement officers was not an issue in this case because, regardless of who the actors were, the courts below applied well-established law and determined that Petitioners failed to state a constitutional claim and further failed to state a claim for municipal liability. Neither the facts of this case nor the Court of Appeals' analysis present an important

constitutional issue. Accordingly, this Court should deny Petitioners' Writ of Certiorari.

ARGUMENT

REASONS FOR DENYING THE WRIT

The sole question presented by the Petitioners is whether the "special needs exception" to the probable cause and warrant requirements of the Fourth Amendment are applicable to the specific facts in this case. Petitioners argue that the Court of Appeals misapplied the Supreme Court's Holding in *Vernonia* and that the Court of Appeals reached the wrong decision in light of this Court's recent decision in *Earls*. Notably, this Court's holding in *Earls* does not repudiate its previous holding in *Vernonia*. More importantly, the Court of Appeals decision does not conflict with this Court's decisions in either *Vernonia* or *Earls*, and in fact, both the District Court and the Court of Appeals reached their decisions by balancing the Petitioners' constitutional rights against the school's governmental interest in preventing violence on campus. Thus, the Fifth Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. This case presents no important question of federal law to be "settled," thus, Rule 10 jurisdiction is not invoked.

Petitioners urge this case is appropriate for review by a grant of certiorari, vacation and remand (GVR) in light of the Court's decision in *Earls* and because this is a

"developing area of the law that deserves closer scrutiny." (Pet. for Cert. 13).

Importantly, Petitioners' challenge underscores the reasons for Supreme Court Rule 10, this Court's procedural rule, which identifies the character of reasons considered in the grant or denial of a petition for certiorari. Rule 10 states, in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

Most assuredly, Petitioners do not meet this criteria. In reality, this case presents nothing more than a legal determination of the sufficiency of pleadings to state a claim. For the reasons that follow, this Court's jurisdiction is not invoked under Rule 10. Therefore, the Court should deny the petition.

A. Petitioners' mischaracterization of the question presented attempts to evade the determinative inquiry.

Initially, the Court should note that Petitioners' phrasing of their "question presented" is suspect. They characterize their "question presented" as "whether the 'special needs exception' to the probable cause and warrant requirements of the Fourth Amendment authorized Respondents, a municipality acting through its police force and a public school district, to arrest Petitioner public school children, subject them to physical searches, handcuff and remove them from campus and hold them in custody solely because they were believed to associate with a student who was suspected of writing a threatening note?" (Pet. for Cert. i). This question, as stated by Petitioners, would be answered in the affirmative by the Fifth Circuit's Opinion here. (*See* Pet.App.B1).

However, Petitioners imply by their question that both the Court of Appeals and the District Court found that specifically because of the "special needs exception," the actions of the local law enforcement officers were justified. Petitioners' implication that the Court of Appeals, as well as the District Court, would not have reached their decision absent the "special needs exception" analysis is simply misleading. Contrary to Petitioners' assertions, both the Court of Appeals and the District Court analyzed Petitioners' allegations by balancing constitutional rights and the governmental interest at issue. Although both courts noted the "special needs exception" as it applies to schools, neither court concluded that the challenged law enforcement action was justified specifically because of the "special needs exception."

B. No conflict exists between the Fifth Circuit's Opinion and any Opinion of this Court, or any other Circuit.

The Fifth Circuit correctly decided the true issue – whether Petitioners state a claim that Respondents violated the Petitioners' Fourth Amendment Rights – and its Opinion does not merit this Court's attention.

In determining whether Petitioners' Fourth Amendment Rights had been violated, the Court of Appeals correctly analyzed the Petitioners' allegations against the school's interest to have a violence-free campus. In examining the facts, the Court of Appeals correctly determined that:

> The reasonableness of search and seizure must be determined by balancing the interests of the government against the invasiveness of the search or seizure. Given the totality of the circumstances surrounding the detention of [Petitioners], we cannot say with the required certainty that the actions of the school officials and police herein were unreasonable.

(Pet.Cert.App.B5). This is exactly the balancing test this Court set forth in *Vernonia* and restated in *Earls*. Indeed, although this Court's decision in *Earls* may have provided greater guidance to the Court of Appeals, as to the application of the "special needs exception" in school settings, it most assuredly would not have charged the Court of Appeals with conducting its analysis under different principles of law. This Court's decision in *Earls* simply does not conflict with its decision in *Vernonia* and thus review of the Court of Appeals' decision in light of *Earls* is simply not warranted.

In light of these facts, the Court of Appeals made a correct decision regarding a fact-specific inquiry. The Petitioners have presented no issue which would warrant this Court's review of this case. Therefore, Rule 10 jurisdiction is not invoked and this Court should deny the petition.

II. This Court's decision in *Earls* did not repudiate the "special needs" analysis set forth in *Vernonia* and the Court of Appeals did not misapply the Supreme Court's Holding in *Vernonia*.

Petitioners argue that the Court of Appeals' decision is a "gross misapplication of the Supreme Court's holding in *Vernonia v. Acton*, and should be summarily reversed for review in light of the Court's recent decision in *Pottawatomie County v. Earls*." (Pet. for Cert. 8). However, even if the Court of Appeals misapplied the law set forth in *Vernonia* – and it did not – such misapplication does not justify granting the writ. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." SUP. CT. R. 10.

More importantly, Petitioners appear to be under the misguided belief that the Court of Appeals' decision "cannot withstand scrutiny under the standard for special needs searches" applied in the *Earls* decision. (Pet. for Cert. 12).

The incident giving rise to this lawsuit occurred "[t]hree days after the tragic and shocking 1999 shooting incident at Columbine High School" and involved a threatening letter found in the Brazosport High School computer room. (Pet.App.B2). "School authorities suspected a

particular student, who spent his idle time with [Petitioners]. . . . They ate lunch together and traveled in the same social circle." (Pet.App.B2). Officers of the Freeport Police Department confronted the students, "placed them in a police car and took them to the Freeport municipal building." (Pet.App.B2-B3). According to the Petitioners, under these facts, the Court of Appeals misapplied this Court's holding in *Vernonia* and did not have the benefit of this Court's decision in *Earls*, which this Court rendered after the Court of Appeals determined the case at bar. Clearly, Petitioners' argument that the Court of Appeals did not have the benefit of this Court's decision in *Earls* is a red herring. In *Earls*, this Court did not deviate from its holding in *Vernonia*, and, in fact, reiterated that:

> In certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.

Earls, 122 S.Ct. at 2564 (internal quotations and citations omitted). Petitioners offer no argument whatsoever that this Court's decision in *Earls* is somehow contrary to this Court's decision in *Vernonia*. Although Petitioners recognize that both *Vernonia* and *Earls* require that "the special needs exception to the probable cause requirement must be based upon a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the

promotion of legitimate government interests" they argue that somehow the Court of Appeals application of the balancing analysis was "completely inappropriate and is not supported by *Vernonia* or *Earls*." (Pet. for Cert. 11). Petitioners do not seriously contend that the Court of Appeals misapplied the law in light of *Earls*, instead they simply argue that the Court of Appeals reached an incorrect decision when balancing the Petitioners' constitutional rights against the governmental interest.

Contrary to Petitioners' assertions, the crux of the case concerns whether "special needs" existed in the school setting, which justified the actions of the police and school officials in confronting these students, taking them to the City's municipal building, calling their parents, and lecturing the students and their parents. Notably, all of the students were released to their parents and none were arrested.

The Fifth Circuit determined, in the context of the Fourth Amendment, that an "otherwise unconstitutional search may be constitutional; however, when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." (Pet.App.B4, internal quotation omitted). This is the real issue presented by Petitioners. Although the Court of Appeals mentioned *Vernonia* for the proposition that "students in the school environment have a lesser expectation of privacy than members of the population generally," the Court did not base its decision upon the "special needs exception" but instead, correctly decided the issue, after undertaking a reasonableness assessment by balancing the interest of the government against the invasiveness of the alleged search or seizure. (Pet.App.B5).

III. This case does not present an important constitutional issue regarding the standards by which law enforcement officers can search and seize school children and the applicability of the "special needs exception" as to those officers.

According to Petitioners, if the published District Court Order and the Court of Appeals' unpublished Opinion are allowed to stand, this case will become "widely relied upon for the proposition that law enforcement officials can enter school grounds and search and seize students without probable cause, because the police are either bumbling hysterics or simply grossly insensitive, as long as the students selected for such abusive behavior had some social connection to a student who may or may not have broken a school rule." (Pet. for Cert. 16). Importantly, neither the District Court's Order granting respondents' motions to dismiss, nor the Court of Appeals' Opinion affirming the dismissal because of petitioners' failure to state a constitutional violation, stand for the proposition cited by Petitioners. A plain reading of the District Court's Order and the Court of Appeals' Opinion show that the courts below clearly balanced the Petitioners' interest in being free from seizure against the governmental interest in "acting forcefully to stem even the possibility of violent conduct." (Pet.App.D7-9). Importantly, after balancing these two interests, the District Court concluded that the personal invasion was reasonable under all the circumstances. (Pet.App.D9).

Petitioners appear to argue that the "special needs exception" does not apply if local law enforcement officers are involved with assisting school officials in curtailing the possibility of violent conduct. In other words, Petitioners

attempt to segregate the actions taken by the police from those taken by the school officials in order to remove the actions from a "special needs" analysis. The District Court declined Petitioners' invitation "to parse through the actors in such a fashion" because "[t]o the extent that a government interest exists and the actions are reasonable, it is of no import what state actor took the actions." (Pet.App.D7,n7).

The Court of Appeals agreed with the District Court's reasoning "that the mere detention of the students for several hours was not sufficient to establish a Fourth Amendment violation in light of the school's custodial and tutelary responsibilities. . . . Given the totality of the circumstances surrounding the detention of [Petitioners], we cannot say with the required certainty that the actions of the school officials and police herein were unreasonable." (Pet.App.B5). Thus, neither court reached the question of whether the "special needs exception" applies to local law enforcement officers. The facts of this case simply do not lend themselves to this issue, nor do the facts present an important constitutional issue as to whether the conduct of police officers can be analyzed under the special needs exception.

CONCLUSION

The Court of Appeals, as well as the District Court, balanced the facts, as alleged by Petitioners, against the school district's interest in maintaining a violence-free campus, and correctly determined that Petitioners had failed to state a claim and accordingly dismissed Petitioners' Complaint.

The Court of Appeals did not misapply this Court's decision in *Vernonia* or *Earls*, nor does the Court of Appeals' Opinion conflict with either of these cases.

Additionally, the question of whether the "special needs" analysis applies to local law enforcement officers was not the basis for the dismissal of Petitioners' Complaint, and thus, this case does not present an important constitutional issue.

For all these reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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No. 02-448

Supreme Court, U.S.
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In The
Supreme Court of the United States

JEREMY DOUGLAS HILL, LUCAS GALLAGHER, and GEORGE LARRY COURS, as Next Friends of Courtney Cours, a Minor,

Petitioners,

v.

CITY OF FREEPORT, TEXAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT BRAZOSPORT INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. Proceedings Below

Petitioners, Jeremy Douglas Hill and Lucas Gallagher (originally through their parents and guardians), filed this action against the Brazosport Independent School District ("Brazosport ISD") and the City of Freeport, Texas. (Pet. Writ Cert. at 3, fn.1.) Defendant Brazosport ISD filed a motion to dismiss for failure to state a claim. (Pet. Writ Cert. at 3, fn.1.) The City of Freeport also filed a motion to dismiss. (Pet. Writ Cert. at 3, fn.1.)

Petitioners amended their complaint to add George Larry Cours, as next friend of Courtney Cours, and removed Petitioner's guardian/parents as next friends (with Hill and Gallagher asserting their causes of action on their own behalves). (Pet. Writ Cert. at 3.) Brazosport ISD and City of Freeport filed amended answers and motions to dismiss and the District Court granted the motions. (Pet. Writ Cert. App. D.) Petitioners appealed the dismissal to the Fifth Circuit Court of Appeals. Oral argument was heard on March 5, 2002 and the Court of Appeals issued its opinion upholding the District Court on May 20, 2002. (Pet. Writ Cert. App. B.) Petitioners filed a petition for hearing, which was denied on June 17, 2002. (Pet. Writ Cert. App. A.) Petitioners filed the instant Petition for Writ of Certiorari on September 13, 2002.

II. Statement of Relevant Facts[1]

Petitioners were among a group of students who were detained on April 27, 1999, by the City of Freeport Police Department for questioning following receipt of a threatening letter left at their school, Brazosport High School. (Pet. Writ Cert. App. E at E5-E7.) The letter, which threatened school violence, was found by Brazosport High School officials just a few days before the Petitioners were taken into custody. (Pet. Writ Cert. App. E at E7.) Petitioners allege that fellow students identified them and several of their friends as a social clique or group, and thus, when one of group members the Petitioners associated with was suspected of authoring the threatening note, the Petitioners were questioned by Mr. Doug Boone, principal of Brazosport High School, and the City of Freeport Police. (Pet. Writ Cert. App. E at E9.) The Petitioners allege that they were frisked, handcuffed and detained by the City of Freeport Police. (Pet. Writ Cert. App. E at E6.) The Petitioners claim that they were berated by the police and threatened with jail time if they did not cooperate. (Pet. Writ Cert. App. E at E6.) The Petitioners also allege that once they arrived at city hall, they were placed in a courtroom where they and their parents were lectured and yelled at in a hostile tone by the police and Mr. Boone. (Pet. Writ Cert. App. E at E7.) Petitioners were subsequently released to their parents

[1] In light of the 12(b)(6) standard of review, the "facts" described in the Statement of Facts section are simply those *alleged* in the Petitioners' Complaint. Brazosport ISD strongly disputes Petitioners' version of the facts in this case.

and no further action was taken. (Pet. Writ Cert. App. E at E8.)

REASONS FOR DENYING THE WRIT

I.

The Fifth Circuit Court of Appeals Correctly Applied the Supreme Court's Holding in *Vernonia v. Acton* and *Pottawatomie County v. Earls* does not Conflict with the Fifth Circuit's Decision in this Case

A. The Fifth Circuit Court of Appeals Correctly Applied the Fourth Amendment Standard

Petitioners have argued that the Fifth Circuit "grossly misapplied" the holding in *Vernonia v. Acton* in its decision upholding the dismissal of Petitioners' Fourth Amendment violation claims against the Brazosport Independent School District and the City of Freeport, Texas. Petitioners also assert that the "federal courts have recognized that when local law enforcement is involved in investigations of school children for criminal activity, absent exigent circumstances, the same probable cause requirements control police action regardless of whether or not the child is in school or off of school grounds." (Pet. Writ Cert. at 8.) These statements are without merit.

Petitioners further argue that *Picha v. Wielgos*, a 1976 federal district court case, is widely accepted "as the rule of law" regarding searches and seizures of students by law enforcement personnel on school campuses and that the Supreme Court's decision in *New Jersey v. T.L.O.* cites this case for authority. (Pet. Writ Cert. at 8-9.) This statement, too, is without merit. For support, Petitioners site a list of

sixteen cases for the proposition that *Picha* is "the rule of law" on the issue of probable cause and searches of school students. (Pet. Writ Cert. at 9.) At first blush, this list of cases appears impressive. However, examination of the citation string reveals that only two cases even remotely support the proposition for which sixteen cases have been cited.

First, Petitioners cite *New Jersey v. T.L.O.* stating that the Supreme Court did not "extend" its ruling to a search conducted by school officials in conjunction with law enforcement and cited *Picha v. Weilgos* in doing so. (Pet. Writ Cert. at 9.) This statement is misleading in that it avers that the *T.L.O.* decision somehow expressed an opinion on searches done jointly between school personnel and law enforcement and that the Court cited to *Picha* as support. The Supreme Court did not decline to "extend" its ruling in *T.L.O.* to school searches involving law enforcement officials, but rather did not consider this circumstance nor did it express an opinion one way or the other regarding this type of search. The Court also did not cite to *Picha* as support. The Court, in footnote 7, states:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question. *Cf. Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (N.D. Ill 1976) (holding probable-cause standard applicable to searches involving police)."

New Jersey v. T.L.O., 469 U.S. 733, 743 n.7 (1985). The *Picha* cite is a "compare" citation only to emphasize that this issue was not raised by the facts of *T.L.O.* and clearly not as support for not "extending" the ruling to include searches including police involvement.

Second, Petitioners cite five Fifth Circuit opinions that allegedly support their proposition that searches involving the police are held to a higher standard. Three of the cases have absolutely nothing to do with searches by school and/or police officials. *See Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992) (involving due process and equal protection claims by a student sexually molested by a teacher); *Fee v. Hernedon*, 900 F.2d 804 (5th Cir. 1990) (addressing a Section 1983 claim by a special education student for excessive corporal punishment); *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987) (examining qualified immunity for alleged due process violations claimed when student was tied to her desk for an entire school day). The remaining two cases cited are inapplicable to the instant case as well. *See Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982) (holding that random use of drug-detection dogs by school officials to inspect a student's person was a search under the Fourth Amendment and required a reasonable suspicion prior to inspection); *Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971) (examining a college regulation allowing school officials and police officers to search dormitory rooms without a warrant or student consent). *Horton* specifically did not address the standard applied when a school official acts in conjunction with local law enforcement, *see Horton*, 690 F.2d at 481 n.19, and the *Piazzola* case simply does not address the applicable

standard for determining the reasonableness of a search on a primary or secondary school campus.

Finally, the majority of the remainder of district court and state court cases cited do not support the proposition that *Picha* is "widely regarded as the rule of law" on the issue of student searches involving local law enforcement. *See, e.g.*, *Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1982) (citing *Piazzola* and *Picha* solely for the proposition that student searches are subject to the Fourth Amendment and does not address searches involving law enforcement); *Cales v. Howell Pub. Schs.*, 635 F. Supp. 454 (E.D. Mich. 1985) (involving qualified immunity claims for school personnel involved in strip search of student and does not address searches involving law enforcement); *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980) (addressing the constitutionality of the use of drug-detection canines in student searches and does not address searches involving law enforcement); *Belliener v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977) (addressing reasonableness of strip search conducted by school officials and does not address searches involving law enforcement); *New Mexico v. Tywane H.*, 933 P.2d 251 (N.M. Ct. App. 1997) (suppressing evidence recovered from a student by police officers hired as security guards during an after-school dance sponsored by a private entity); *Kuehn v. Renton Sch. Dist. No. 403*, 694 P.2d 1078 (Wash. 1985) (prohibiting suspicionless searches of students' luggage as a condition to participation in band concert tour and does not address searches involving law enforcement); *M.J. v. Florida*, 399 So.2d 996 (Fla. Dist. Ct. App. 1981) *overruled by Florida v. D.S.*, 685 So.2d 41 (Fla. Dist. Ct. App. 1996) (rejecting the *M.J.* decision and stating that the legality of a search of student – by school officials or otherwise – depends upon

the reasonableness under all circumstances of the search). The two cases that infer that police presence during student searches may invoke a higher Fourth Amendment standard (than a search by school officials alone) are cases from an out-of-state federal district court and state court that were decided prior to *New Jersey v. T.L.O.* and thus, have no precedential value in the Fifth Circuit Court of Appeals and have little, if any, probative value.

Petitioners' allege that the Southern District of Texas and the Fifth Circuit Court of Appeals "disregarded extensive precedent" regarding student searches by school officials and police officers in holding that the special needs exception to the Fourth Amendment applied in the instant case. (Pet. Writ Cert. at 8.) As discussed in detail above, this alleged "extensive precedent" does not support Petitioners' assertions. Furthermore, Petitioners, in their list of cases, fail to cite to the *one* Fifth Circuit case on point in this matter: *Milligan v. City of Slidell*, 226 F.3d 652 (5th Cir. 2000).

In *Milligan*, school officials detained the plaintiffs, a group of high school students believed to be involved in or have knowledge of a scheduled after-school fight. *See Milligan*, 226 F.3d at 653. The vice principal called the students into his office where they were interrogated by police regarding their involvement and/or knowledge of the scheduled fight. *See id.* One of the plaintiffs testified that he felt physically intimidated by the police interrogation and that he did not feel free to leave the interrogation. *See id.* Notably, the Fifth Circuit Court of Appeals, in striking a balance between the competing governmental and individual interests at issue in *Milligan*, did not require the vice principal or the police to act pursuant to probable cause. *See id.* at 655-56. Furthermore, the Fifth

Circuit in *Milligan* overturned the district court decision, which required reasonable suspicion due to the involvement of the police. The Fifth Circuit found that the district court's analysis was "inappropriate" because the case involved the rights of students in a public school setting and that the proper inquiry was directed by *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). *See Milligan*, 226 F.3d at 654. Thus, Petitioners' assertion that the Fifth Circuit misapplied the holding in *Vernonia* and disregarded precedent in making its decision is erroneous. As a matter of fact, a finding by the Fifth Circuit that probable cause was required would have ignored the binding precedent of *Milligan*. Petitioners' argument is without merit and the Petition for Certiorari should be denied.

B. The recent decision of *Pottawatomie County v. Earls* does not conflict with the Fifth Circuit's decision below

Petitioners erroneously argue that the Supreme Court decision in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 122 S. Ct. 2559 (2002) raises the standard by which the special needs exception to the Fourth Amendment is judged and that the Fifth Circuit Court of Appeals decision below cannot withstand the scrutiny required by *Earls*. (Pet. Writ Cert. at 12.) Petitioners argue that the *Earls* decision, which upheld the right of school officials to randomly drug test students participating in extracurricular activities, was conditioned upon the exclusion of police involvement. (Pet. Writ Cert. at 10-11 (stating that the *Earls* decision extended "the right of school officials, *without the assistance*

or participation of local law enforcement officers, to drug test students")). This is not true.

In determining the reasonableness of the search at issue, the Court in *Earls* examined the character of the intrusion on the students' privacy interests. *See Earls*, 122 S. Ct. at 2566. In examining the intrusiveness of collecting urine samples, the Court examined how the samples were collected and what was done with the samples once obtained. *See id.* at 2566-67. In determining that the "invasion of students' privacy [was] not significant," the Court considered to whom the test results would be disclosed. *See id.* at 2567. The Court found that the decision not to share the test results with local law enforcement militated against the alleged privacy intrusion alleged by the plaintiffs. This was but one factor considered by the Court in balancing the privacy interests of the students against the nature and immediacy of the school's need to provide a safe, drug-free environment. The involvement, or lack thereof, of law enforcement was a factor considered in determining the reasonableness of the search at issue; it was not a prerequisite to the standard to be invoked in determining the legality of the alleged Fourth Amendment violation. Petitioners' argument that *Earls* warrants vacation and remand of the decision below is misplaced and the Petition for Certiorari should be denied.

II.

The Fifth Circuit's Decision Appropriately Considered the "Special Needs Exception" to the Fourth Amendment and This Case Does Not Have Far-Reaching Implications to Warrant Review by the Supreme Court.

Petitioners argue that a fact-specific balancing of the intrusion on privacy versus the government's legitimate interest must be done to determine the reasonableness of a search of a school student. This is true and exactly what the District Court and Fifth Circuit Court of Appeals did in this case. The Fifth Circuit Court of Appeals held that the "district court reasoned that the mere detention of the students for several hours was not sufficient to establish a Fourth Amendment violation in light of the school's custodial and tutelary responsibilities. Under all relevant circumstances herein we are compelled to agree." (Pet. Writ Cert. App. B at B5.)

In conducting the fact-specific balancing, the District Court properly weighed Brazosport Independent School District's tutelary and custodial interests against the Petitioners' privacy interests. (Pet. Writ Cert. App. D at D8-D9); *see also Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656-657 (1995) (directing courts, in undertaking the Fourth Amendment reasonableness inquiry, to consider a school's custodial and tutelary responsibility for children). The Fifth Circuit recognized this balancing and agreed with the result. (Pet. Writ Cert. App. B.)

In the context of schools, it is well-settled that students have a lesser interest in privacy than the general population and school officials have a substantial, if not a compelling interest, in maintaining order and discipline.

See New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) ("Against the child's privacy interest must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds."). Under the 12(b)(6) standard, the District Court properly assumed that the Petitioners' pleadings alleged a strong interest in being free from "the frisking, handcuffing, and subsequent detention that took place." (Pet. Writ Cert. App. D at D7.) The District Court next turned to the importance of the governmental interests involved. (Pet. Writ Cert. App. D at D9.) In assessing the weight of the school district's interests, the District Court focused on the immediacy of the Brazosport ISD's interests and the efficacy of the means used to address the governmental interest pursuant to the Fifth Circuit decision in *Milligan v. City of Slidell*, 226 F.3d 652 (5th Cir. 2000).

The District Court determined the school district and City of Freeport's interests in detaining and questioning the Petitioners regarding threatened school violence outweighed the Petitioners' privacy interests. The District Court found that "[t]he bottom line is that the rights asserted by Petitioners, although legitimate and substantial, do not outweigh the School's dramatically compelling interests in maintaining a safe place of learning." (Pet. Writ Cert. App. D at D9.) The Fifth Circuit Court of Appeals reviewed this fact-specific balancing and held that "[g]iven the totality of the circumstances surrounding the detention of appellants, we cannot say with the required certainty that the actions of the school officials and police herein were unreasonable." (Pet Writ Cert. App. B at B5.)

The facts, as alleged by the Plaintiffs, support the District Court and the Fifth Circuit's determinations. The Petitioners admit that Brazosport High School officials

found a "purportedly threatening letter" in the High School computer lab several days before the April 27, 1999 incident. (Pet. Writ Cert. App. E at E6-E7.) The Plaintiffs also admit they were among a group of students identified as individuals with possible knowledge of or associates of the student who left the threatening letter. (Pet Writ Cert. App. E at E9.) In a time of increasing school violence throughout the nation, the District Court's determination that a school district's interests in protecting students from indiscriminate school violence outweighs the Plaintiffs privacy interest was indeed appropriate. (Pet. Writ Cert. App. B.)

Although the Petitioners attempt to minimize the importance of the time period within which the incident occurred (seven days after the tragic shootings at Columbine High School) and characterize the responsive behavior of school and law enforcement officials as hysterical (Pet. Writ Cert. at 14), the setting in which this incident occurred is extremely relevant and important.

The Fifth Circuit, in conducting a fact-specific balancing of the competing interests, considered the "totality of the circumstances" and found that the safety of the campus outweighed the Petitioners' Fourth Amendment rights in this "sharply defined setting." (Pet. Writ Cert. App. B at B5.) The Fifth Circuit acknowledged the unique nature of the incident and limited its unpublished holding to the facts of this case. Thus, the argument by Petitioners that the District Court and Fifth Circuit cases in this matter will become authority for police to indiscriminately enter school campuses and seize students is disingenuous. The Fifth Circuit appropriately considered the "special needs

exception" and this case does not have far-reaching consequences and, therefore, the Petition for Certiorari should be denied.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(4)

NO. 02-448

IN THE
SUPREME COURT OF THE UNITED STATES

JEREMY DOUGLAS HILL,
LUCAS GALLAGHER, AND GEORGE LARRY COURS,
AS NEXT FRIEND OF COURTNEY COURS, A MINOR,
Petitioners,

v.

CITY OF FREEPORT, TEXAS AND BRAZOSPORT INDEPENDENT SCHOOL DISTRICT,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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November 7, 2002

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In their responses to Petitioners' Petition for Writ of Certiorari, Respondents assert that the Fifth Circuit correctly applied this Court's holding in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and that Petitioners' argument based on *Picha v. Wielgos*, 410 F.Supp. 1214 (N.D. Ill. 1976), is without merit. Respondent Brazosport Independent School District's Brief in Opposition at 4 - 6; Respondent City of Freeport, Texas' Brief in Opposition at 6 - 9. Respondents are in error in both of these arguments.

In upholding the District Court's finding that this case fell within the "special needs exception" to the Fourth Amendment, the Fifth Circuit relied on this Court's holding in *Vernonia* as authority for allowing local police officials and school district officers to summarily seize students out of the classroom, handcuff them, frisk them, transport them to the police station and hold them against their will and under the threat of imprisonment for the sole reason that the students were "socially connected" to a student who had previously left what the school district and police authorities claimed was a threatening note one week before. Petition Appendix ("App.") at B4 - B5. The trial court, without any kind of evidentiary hearing or even summary judgment evidence being put forth, dismissed the case under FED. R. CIV. PROC. 12(b)(6). App. at D11.

What *Vernonia* and *Board of Education of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002) both make clear is that when this Court has authorized school officials to drug test students, it has been important to the decision that the results of the testing

would not be used in a criminal context, local police authorities were not notified of the test results and a great deal of effort was made to protect the privacy of the students and their bodily integrity. In this case, there was significant law enforcement direction and control involved. Students were seized out of the classroom, frisked, handcuffed, threatened with imprisonment, and held them against their will by law enforcement officers, not school officials. Further, there was nothing in Petitioners' petition or pleadings filed in response to the Respondents' moving papers that would have suggested that Respondents did anything to attempt to protect the privacy interests of the Petitioners. App. at E1 -13. To the contrary, Respondents made a public display of Petitioners' arrests to intimidate Petitioners and the entire student body.

The Respondents have either disregarded Petitioners' arguments based on *Picha* and its progeny (*see generally* Brief of Respondent City of Freeport), or have misconstrued the law and the importance of the *Picha* case (*see generally* Brief of Respondent Brazosport at 4 - 6). The District Court specifically failed to address the issues raised by *Picha*, instead dismissing the issue without explanation. App. at D7. Respondent City of Freeport specifically pleaded in its brief to the Fifth Circuit that not only were the Petitioners *not suspected of engaging in any criminal conduct,* Freeport claimed that Petitioners were *not even seized and taken into custody in connection with the investigation of any criminal conduct.* Brief of Appellee City of Freeport at 11. Freeport made this argument to avoid the pitfalls of the holding in *Picha* and the cases that have followed it in which the courts have required that before there may be a constitutional warrantless search of a student there must be at least a reasonable, individualized suspicion that the student has engaged in wrongdoing.

Contrary to the claims of Brazosport in its response, *Picha* has been cited widely for the proposition that, if school officials bring in local police to conduct a search and possible seizure of students, the police must act based on a reasonable suspicion that the student subject to the police action has broken the law. *See* cited cases, Pet. at 15. While it is a district court opinion, the widespread impact of *Picha* cannot be ignored. The fact that this Court in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) addressed *Picha* in what for all purposes can only be described as a caution to school districts and police authorities, *id.* at 341, n.7, conferred a level of importance to the *Picha* opinion that would not ordinarily be given to a district court opinion. Neither of the Respondents, nor the District Court or the Fifth Circuit, cited even one case that authorized local police authorities to enter the school grounds and search, seize and detain students without any individualized suspicion that they had committed a criminal act or were in the process of committing a criminal act or probable cause as required under the Fourth Amendment. The published opinion in this case now provides authority for such police actions, even when the action is based on "bumbling hysteria" rather than legitimate policing practices.

Vernonia and *Earls* also make it clear that the balancing of governmental and private interests in a search and seizure that implicates Fourth Amendment interests is fact-intensive, and that before a special needs exception may allow for certain police conduct that would otherwise violate the Fourth Amendment, an evidentiary hearing should be held to determine whether in fact the special needs of the government are so compelling that they outweigh the inherent risks associated with disbanding the constitutional requirement of probable cause. In this case, there was no evidentiary hearing to allow either party to establish whether

or not there was truly a special need that would vitiate the Fourth Amendment requirements of probable cause, or at least some individualized suspicion that the Petitioners had engaged in a breach of the law or were in the process of breaching the law.

The District Court's published opinion and the affirmation of that decision by the Fifth Circuit has created a significant conflict not only between other cases in the Fifth Circuit but in other circuits and, arguably, even with the implication of this Court's dicta in *New Jersey v. T.L.O.* In light of the District Court's refusal to even acknowledge or address the issue raised by Petitioners concerning the constraints placed on local law enforcement officials by the Fourth Amendment when they are conducting searches of students and previous court rulings on the issue, Petitioners' case is appropriate for review by a grant of certiorari, vacation and remand in light of *Pottawatomie County v. Earls.*

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted, and the case vacated and remanded for reconsideration in light of *Board of Educ. Of Pottawatomie County v. Earls, supra,* or in the alternative, set for hearing on the merits before this Honorable Court.

Respectfully submitted,

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